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SAVING DEATH TAXES THROUGH LIFETIME GIFTS
William J. Bowe

ANOTHER LOOK AT ACCESSION
Roscoe Cross

PRACTICE AND PROCEDURE BEFORE THE MISSISSIPPI WORKMEN'S COMPENSATION COMMISSION
Frank E. Shanahan, Jr.

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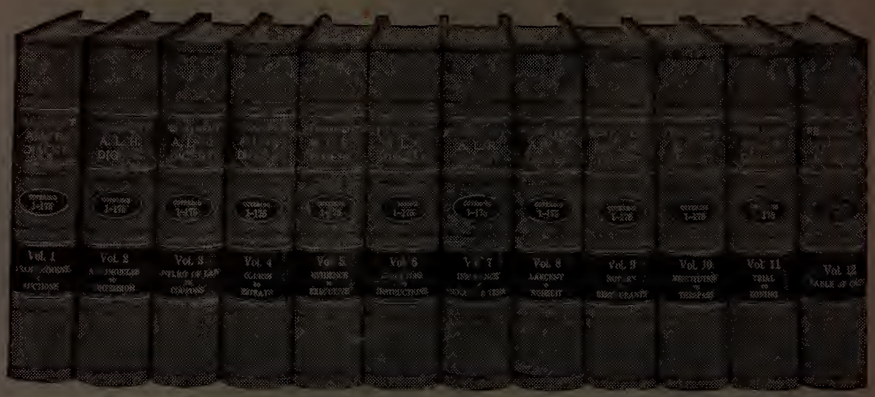

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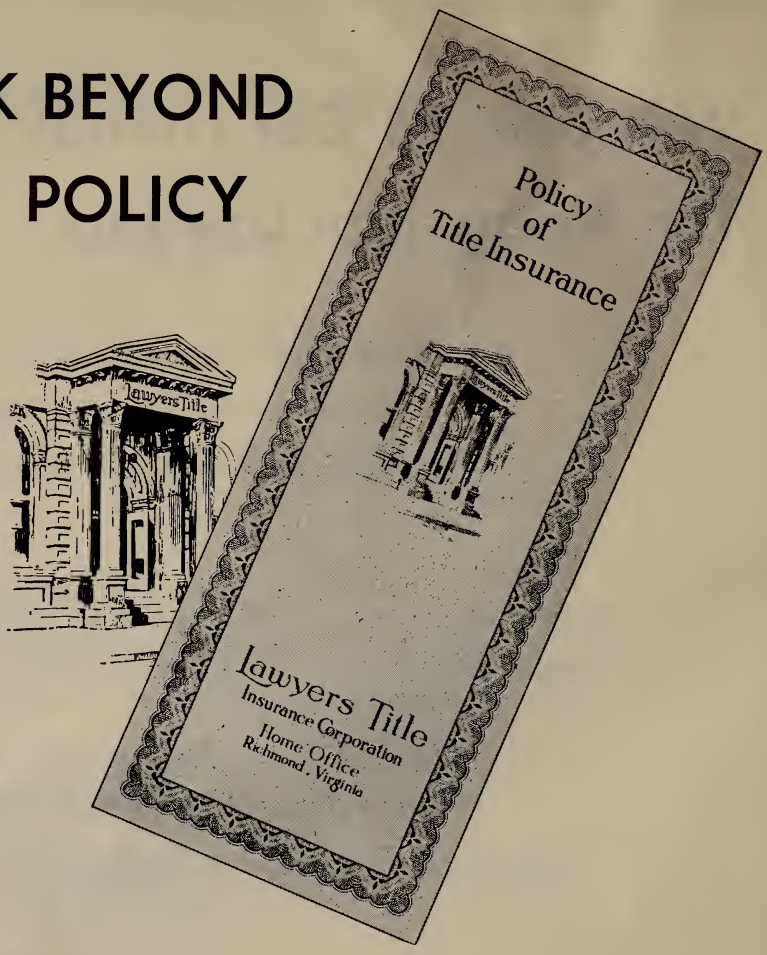

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SAVING DEATH TAXES THROUGH LIFETIME GIFTS

*William J. Bowe**

The federal gift tax title of the Internal Revenue Code[1] was enacted primarily as a measure to compensate for the loss of estate taxes that result from inter vivos transfers.[2] Gift tax rates are fixed at exactly three-quarters of the estate tax rates. This does not mean, however, that lifetime gifts will eliminate only 25% of potential estate taxes. The saving will always be very much larger than this because of the use of the gift tax exemption and the fact that the amount of the gift is taxed at the lowest gift tax rates whereas the donated property is removed from the highest estate tax bracket. For example, a gift of $50,000 by an unmarried donor whose estate is presently valued at $200,000 will incur gift tax of $943 but will eliminate potential estate tax of almost $15,000.

I.

Assumed Gross Estate		$ 210,000
Debts and Administration Expenses	$ 10,000	
Specific Exemption	60,000	70,000
Net Taxable Estate		140,000
Federal Tax	$ 32,700	

II.

Gross Estate After Gift of $50,000 and Payment of $943 Gift Tax		$ 159,057
Debts and Administration Expenses	$ 9,057	
Specific Exemption	60,000	69,057
Net Taxable Estate		90,000
Federal Tax	$ 17,900	
Gift Tax	943	
Total Federal Taxes	$ 18,843	

Thus the gift of $50,000 reduces the total Federal taxes on the transmission of the assumed estate from $32,700 to $18,843, a tax saving of $13,857.

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*Professor of Law, Vanderbilt University.

[1]INT. REV. CODE §§ 1000-1031.

[2]Magill, *The Federal Gift Tax*, 40 COL. L. REV. 773 (1940).

Exemption and Annual Exclusions

The Code provides for a gift tax exemption of $30,000.[3] This means that any individual can during his life give away $30,000 without the payment of any gift tax. In addition to this exemption, provision has been made for annual exclusions. Any individual may give away $3,000 each to as many donees as he wishes each year without making any report thereof and without encroaching upon his $30,000 exemption.[4] The annual exclusions are designed to avoid the necessity for filing gift tax returns of Christmas gifts, wedding gifts, and occasional gifts of relatively small amounts.[5] But their use permits the giving away of very substantial sums over a period of years particularly where there are several children and grandchildren. If we assume that our prospective donor is a widower, has $400,000 and three children, each of whom is married and each of whom has two children, we have within the family twelve tax entities. He may, in addition to giving away $30,000 free of tax, give $3,000 to each of the twelve members of his family. Thus in one year he could give away free of tax $66,000 and the next year he could give away $36,000 more. Over a five year period he may transmit $210,000 free of any gift tax and free of any estate tax. The estate tax saving in such a case would amount to $65,000.

Gifts to a Spouse and Gifts by a Married Person

Prior to 1948 the residents of community property states, those western states that have a strain of Spanish law in their systems, enjoyed a tremendous estate tax advantage. Under the community property system, one-half of any wealth acquired by the activity of either spouse during the marriage automatically belonged to the other spouse. Thus a Texan who acquired $200,000 would on his death have his estate tax measured on $100,000 since that was all of the property that he could dispose of by will. The estate tax would be $4800. On the other hand, a Mississippian similarly situated could control the devolution of the full $200,000 and his estate tax on that sum would be $32,700. This represented a tax differential in favor of the Texan of $27,900. In order to bring about substantial estate tax equality Congress in 1948 created the estate tax marital deduction under which property passing to a spouse at death is free of tax up to 50% of the adjusted gross estate, *i.e.*, the gross estate less administration expenses and debts.[6] Thus today if the Mississippian with

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[3]Int. Rev. Code § 1004(a)(1).
[4]Int. Rev. Code § 1003.
[5]H.R. Rep. No. 708, 72nd Cong. 1st Sess. (1932).
[6]Int. Rev. Code § 812(e).

$200,000 leaves $100,000 to his wife, his executor deducts, in computing his taxable estate, the $100,000 gift to his wife and the $60,000 exemption, leaving subject to tax $40,000 on which the tax is $4800.[7]

A corresponding gift tax inequality was removed by the allowance of a gift tax marital deduction.[8] This again may be best understood by comparing a typical Texas gift with a Mississippi gift. If a Texas real estate operator should close a large deal and get a commission of $66,000 and present the check to his wife, he would have made no taxable gift since $33,000 already belonged to her by law and the other $33,000 comes within his exemption and exclusion. On the other hand, a Mississippian doing the same thing before 1948 would have made a $33,000 taxable gift. Today under the new gift tax marital deduction he may deduct half of any gift to his wife, thus a $66,000 gift to his wife comes within his $30,000 exemption, his $3,000 exclusion, and his $33,000 marital deduction.

In addition to the marital deduction, there is a gift splitting privilege between spouses.[9] To revert to our previous case, if the Texan had given the $66,000 to his son, there would be no gift tax since only $33,000 of it belonged to him; the balance was owned by his wife. The gift attributable to each was within the exemption and exclusion given to each spouse. Under the 1948 Act, a gift by one spouse may, with the consent of the other, be treated as made half by each spouse. This amendment similarly puts the Mississippian in the same position as the Texan.

While there is no longer any income tax saving in gifts between spouses because of the income tax splitting provisions of the Code,[10] the amendments discussed above enlarge the estate tax savings resulting from gifts by spouses and gifts between spouses. It must be remembered that the marital deduction will be a valuable privilege only if the spouse possessing the family wealth is the first to die. Thus if a husband with $200,000 leaves one-half of his estate to his wife and predeceases her his estate tax will only be $4800. On the other hand, if he survives her his estate tax will be, as before 1948, $32,700.

Where the husband, as in the assumed case, has $200,000 and the wife's assets are nominal it may be advisable for him to give her $66,000 which he may do in one year free of any tax. There will then be substantially

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[7]In order to qualify a gift for the deduction it must be given to the wife in such a way that it will be subjected to estate tax on her death. Therefore, the gift must be outright or for life with remainder to her estate or for life with a general power of appointment. Any one of these forms of gift assures taxation of the fund on her death unless she has consumed it in the meantime.

[8]INT. REV. CODE § 1004(c).

[9]INT. REV. CODE § 1000(f).

[10]INT. REV. CODE § 12(d).

no estate tax if he leaves one-half of the balance of his property to his wife and predeceases her.[11] On the other hand, if he survives her there will be no estate tax payable on her death since after allowances for debts and administration expenses the property given to her will fall within her $60,000 estate tax exemption.

The gift splitting privilege also makes gifts to children very much more attractive taxwise than they were prior to 1948. In the illustration given in the opening paragraph of this article there would be no gift tax payable at all since the $50,000 gift would be treated as having been made one-half by each spouse and it would come comfortably within their two exemptions. In the later illustration where it is suggested that the unmarried donor could over a five year period give away $210,000 free of tax the same donor if married could give away to the same family group (and to his own spouse) $138,000 in one year and $78,000 in any later year. In the first year one-half of the gifts to the children, their spouses and grandchildren, would be treated as having been made by him, the other half by his wife. His exemption and twelve exclusions would account for $66,000. The other $66,000 distributed to the group would be charged against the exemptions and exclusions of his wife. The remaining $6,000 of the $138,000 would be given to his wife and falls within his marital deduction and his exclusion for gifts to her.

Gifts in Contemplation of Death

In any discussion of gifts for the purpose of avoiding estate taxes, the specter of the contemplation of death provision of the Code looms large. But it is not a crime to make a gift in contemplation of death. First, the gift will not be found to have been in contemplation of death if some life motives can be shown.[12] A desire to reduce income taxes,[13] a desire to see how one's family manages wealth,[14] a desire to be relieved of the management of property[15] and countless other reasons have been held life motives. Dean Griswold has said: "It is a rare case that does not leave the lawyer an opening to show that some motive other than the thought of death was the inducement for the gift."[16] Because of the uncertainty in the outcome of litigation there are always excellent possibilities that such disputes will be compromised with substantial tax savings. In addition,

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[11]His gross estate would be reduced by the gift to $136,000 and if we assume $10,000 of debts and administration expenses, his marital deduction would be $63,000, his estate tax exemption $60,000, leaving a net taxable estate of only $3,000. The tax on $3,000 is only $90.

[12]See generally, Bowe, Tax Planning Estates 26-27 (1949).

[13]Becker v. St. Louis Trust Co., 296 U.S. 48 (1935).

[14]Kroger, 2 CCH TC Mem. Dec. 644 (1943).

[15]Tait v. Safe Deposit and Trust Co., 74 F.2d 851 (1935).

[16]Griswold, Cases on Federal Taxation 149 (2d ed.).

the 1950 Revenue Act has provided that any gift made more than three years before death shall be conclusively presumed *not* to have been made in contemplation of death.[17] And lastly as the illustration below shows, there will be a saving in taxes even if the executor concedes that the gift was deliberately made in contemplation of death.[18]

I.

Net Taxable Estate Before Exemption		$400,000	
Estate Tax		94,500	
Passes to Heir			$306,000

II.

Net Estate		$400,000	
Gift to Heir	$200,000		
Gift Tax	31,000	231,000	
Total		$169,000	
Net Estate at Death	$169,000		
Inclusion of Gift in Contemplation of Death	200,000		
Net Taxable Estate	$369,000		
Estate Tax	$ 84,900		
Less Gift Tax Credit	31,000		
Total Tax Payable	$ 53,900		
Net Estate at Death		$169,000	
Tax After Credit		53,900	
Passes to Heir on Death			$116,100
Passes by Inter Vivos Gift			200,000
			$316,100

SUMMARY

Property Passing to Heir, Partly by Gift in Contemplation of Death	$316,100
Property Passing to Heir by Will	306,000
Difference	$ 10,100

[17] "*Contemplation of Death.* If the decedent within a period of three years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of subsections (c), (d), and (f); *but no such transfer, relinquishment, exercise, or release made prior to such three-year period shall be deemed or held to have been made in contemplation of death.*" (Italics added.) INT. REV. CODE § 811 (1)

[18] This statement assumes that the donor's income tax cost basis equals the market value of the property at the time of the gift and that the property does not substantially increase in value between the date of gift and date of death.

FORM OF GIFT

Internal Revenue Code, Section 811 includes within the gross taxable estate property which is not a part of the estate for administration purposes on the theory that certain transfers are so akin to testamentary dispositions that their inclusion is necessary to prevent widespread avoidance. The fact that a gift tax has been paid on an inter vivos transfer does not give any assurance that the property will not be retaxed at death, with credit for the gift tax paid.[19] For example, Jones buys Blackacre taking title in the joint names of himself and his sister. By such act he has made a taxable gift of approximately one-half of the value of the property, yet the statute requires inclusion of the full value of the property at his death.[20] Joint tenancies not only accomplish no estate tax saving but they frequently result in the incurring of unnecessary income taxes. A bought Blackacre for $10,000 in 1930. At his death in 1945, at which time it had a value of $19,000, he devised it to his wife. If she sells it in 1951 for $20,000, she will incur a long term capital gain of $1,000. If Jones, on the other hand, had taken title in their joint names as tenants by the entireties, the long term gain would be $10,000.[21] The reason for this is that a donee takes his donor's cost basis for purposes of computing gain,[22] whereas a legatee takes as his cost basis the value of the property at the date of death.[23]

A revocable trust may deprive the widow of her statutory share.[24] It may remove property from the claims of creditors. It may be used to avoid a statutory prohibition against testamentary charitable gifts.[25] But because of the substantial control which such a donor retains the corpus will be taxed as though it were part of the estate.[26] Any other rule would defeat the operation of the estate tax. It would make avoidance too easy.

The reserved life estate is another example of the retention of such substantial benefits that the corpus will be taxed even though the remainder has been irrevocably given away.[27] Here the property comes into possession and enjoyment at death and so is not unlike a testamentary gift. Even where the donor has relinquished all interest in the property, as in a gift in trust with the income to be accumulated until his death and then paid to his family, the possession and enjoyment provision of Internal Revenue Code,

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[19]INT. REV. CODE § 813. See generally, BOWE, TAX PLANNING FOR ESTATES 60-62 (1949).
[20]INT. REV. CODE § 811 (e).
[21]Lang v. Commissioner, 289 U.S. 109 (1933). Carpenter, 2 B.T.A. 282 (1932).
[22]INT. REV. CODE § 113 (a) (2).
[23]INT. REV. CODE § 113 (a) (5).
[24]Kerwin v. Donaghy, 317 Mass. 559, 59 N.E.2d 299 (1939). But cf. Newman v. Dore, 275 N.Y. 371, 9 N.E.2d 966 (1937).
[25]City Bank Farmers Trust Co. v. Charity Organization Soc'y of New York, 238 App. Div. 720, 265 N.Y.Supp. 267 (1932).
[26]Reinecke v. Northern Trust Co., 278 U.S. 339 (1929).
[27]Church v. Commissioner, 335 U.S. 632 (1949).

Section 811(c) will tax the corpus as though he owned it.[28] Further, any retention of control by him will have the same effect. Typical of this latter class of gifts are the cases where the donor reserves the right to reallocate income among the beneficiaries. For example, in the *Porter* case[29] the father created an irrevocable trust for the benefit of his children providing that in no event should any portion of funds ever come back to him. He reserved, however, a right to change the interests of the beneficiaries. Thus in any year he could have taken away one-third of the income from his son, *A,* and directed the trustee to pay it to his daughter, *B.* The Supreme Court held that the corpus of the fund must be included as part of his estate because the gift was incomplete, because he retained a power to revise all he had done.

In order to make a gift effective for tax purposes, it is necessary that the donor completely divorce himself from any interest in or dominion or control over the donated property and his donee's enjoyment of the property must not be postponed until the donor's death. Such gifts may be accomplished either as outright transfers or transfers in trust so long as the donor completely eliminates himself from the picture. It is, of course, advisable to make such gifts in trust since putting the property in trust will avoid any estate tax on the death of the donee.[30]

Property to be Given

In determining what property to make the subject matter of the gift, there are certain pitfalls to be avoided. Internal Revenue Code, Section 811(g) which deals with life insurance makes it always undesirable to give away a life insurance policy on which the insured has paid the premiums. The Act provides that the proceeds of life insurance shall be included in the estate of the insured if (1) he owned the policy at death, or (2) he paid the premiums. Payment of the premiums is regarded as enough without ownership to require inclusion of the proceeds of the policy in the insured's estate on the same theory that jointly owned property is taxed.[31]

As has been noted above where property is transferred by gift, the donee takes his donor's cost basis. Because of the possibility of a later sale by the donee this factor must be considered in determining what property to give. For example, if Jones owns twenty shares of *X* stock for which he paid $100 and which is now selling for $150 and he has *Y* stock

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[28] Int. Rev. Code § 811(c) (3).
[29] Porter v. Commissioner, 288 U.S. 436 (1933).
[30] See generally, Bowe, Tax Planning for Estates 7-15 (1949).
[31] See generally, Bowe, Life Insurance and Estate Tax Planning (1950).

for which he paid $80 and which is now selling for $80, it is preferable to give the latter stock and hold the *X* stock until the "angel of death" gives it an enhanced cost basis on the owner's death.[32] On the other hand, a donee does not take his donor's cost basis for purposes of computing loss if the market value of the stock at the date of the gift is less than the donor's cost.[33] Thus, if the donor had paid $200 for his *X* stock, gave it away at a time when it was worth $150, the donee's cost basis for loss would be $150 and if he thereafter sold it for $140 he would have a loss of only $10. Thus a gift of high cost basis stock will result in a loss of the potential deduction. Under such circumstances, it would be better for him to sell the stock, take his loss and make a gift of proceeds.

Another important consideration in the selection of the property to be given is the extent to which particular assets produce income, for in addition to the estate tax saving resulting from an inter vivos gift the donor will also realize within the family income tax savings if he uses high income producing property rather than low income producing property. Thus if the donor has substantially more taxable income than the intended donee, the donor will be better advised to give the donee a 5% mortgage rather than a 3% loan.

Spreading of Gifts Over Several Years

Where the value of the property exceeds either the amount the donor presently wishes to give or the exemption or exclusions against which he wishes to charge it, it is possible to spread the gift over a number of years. Where property is pledged to secure a loan, the value of the gift is the excess in value over the debt for which it is security. In one case,[34] the taxpayer owned securities having a value of $129,270 which were pledged as collateral for a note in the amount of $120,000. He transferred the securities to his wife subject to the debt. The Treasury contended that the amount of the gift was the full value of the securities less $24,000. This sum represented the Commissioner's determination of a reasonable discount "based on the donor's ability to pay, considering all the circumstances." The Court, however, held that the gift was in the amount of $9,270. Any reduction in the amount of the loan thereafter made by the husband would constitute a gift to his wife since it would increase her equity in the securities. Thus, if he desires to make annual gifts to her of $6,000 he may repay that portion of the debt each year.

Another method of spreading a gift of property over a number of years is a sale of property to the donee for less than its full value; for example,

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[32] Int. Rev. Code § 113(a) (5).
[33] Int. Rev. Code § 113(a) (2).
[34] Jackman, 44 B.T.A. 704 (1941).

property worth $24,000 may be sold to a son for $18,000, payment to be made by the execution of a purchase money mortgage to the grantor. Such a sale represents a gift of $6,000 and will, therefore, be within the annual exclusions of the seller and his spouse. At the end of each of the next three years the seller-mortgagee may release free of gift tax $6,000 of the mortgaged debt. Here again the impact of the capital gains tax provisions of the income tax law must be considered since if $18,000 exceeds the seller's cost basis, he will have realized taxable capital gain on the sale, whereas if his cost basis is substantially in excess of that amount, he may not avail himself of the capital loss, since it is an intra-family transaction.[35]

Conclusion

The history of our modern federal tax system has been one of lowering exemptions and increasing rates. In 1928 the $10,000 family paid an income tax of $40.[36] In 1938 the same family paid $343.[37] By 1948, however, their tax was $2,245.[38] The original estate tax exemption was $100,000. It later became $90,000,[39] then $80,000[40] and is now $60,000.[41] However, recommendations have been made to the last two Congresses that this figure be reduced to $30,000 and it seems inevitable that such reduction will take place within the near future. The gift tax pattern has been the same. The exemption started at $50,000, then became $40,000, and is now $30,000 with considerable pressure being brought by the administration to reduce it to $15,000. It would, therefore, seem wise that to the extent gifts are contemplated donors act promptly while substantial estate tax savings are still available from the making of inter vivos transfers.

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[35] Int. Rev. Code § 24(b) (A).
[36] Surrey and Warren, Federal Income Taxation, 13.
[37] *Id.* at 14.
[38] *Id.* at 16.
[39] $50,000 for general assets, $40,000 for life insurance.
[40] $40,000 for general assets, $40,000 for life insurance.
[41] Int. Rev. Code § 935(c).

ANOTHER LOOK AT ACCESSION

*Roscoe Cross**

Without authority or direction from *A, B* appropriates *A's* chattel to his own purposes and by his labor or by his labor primarily, with some materials of his own, *B* changes, improves or enhances the chattel which originally belonged to *A*. What interest or ownership does *A* or *B* have in the resulting end product — and upon what terms? From the days of the Roman Empire at least, lawyers, judges and jurists have had to consider this problem with its unlimited variety of factual circumstances. In consequence, they have purported to develop and apply rules and doctrines commonly grouped under the generic classification of accession. This article is an endeavor to consider, primarily, the situation in which both *A* and *B* have acted in good faith.

For the Roman legal fraternity, the Institutes of Justinian purported to set up the problem and its solution, in part, as follows:

> "When a man makes a new object out of materials belonging to another, the question usually arises, to which of them, by natural reason, does this new object belong . . . to the man who made it, or to the owner of the materials? For instance, one man may make wine, or oil, or corn, out of another man's grapes, olives, or sheaves; or a vessel out of his gold, silver or bronze; or mead of his wine and honey; or a plaster or eye-salve out of his drugs; or cloth out of his wool; or a ship, a chest or a chair out of his timber. . . . If the new object can be reduced to the materials of which it was made, it belongs to the owner of the materials; if not, it belongs to the person who made it. For instance, a vessel can be melted down, and so reduced to the rude material — bronze, silver, or gold — of which it is made: but it is impossible to reconvert wine into grapes, oil into olives, or corn into sheaves, or even mead into the wine and honey of which it was compounded. . . ."[1]

Sir William Blackstone disposed of the problem by stating:

> "By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession, to the property of it under such its state of improvement: but if the thing itself, by such operation was changed into a different species, as by making wine, oil or bread out of another's grapes, olives, or wheat, it belonged to the new operator; who was only to make a satisfaction

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[1]Lorenzen, *Specification in the Civil Law,* 35 YALE L.J. 29, 30 (1925).

> to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts."[2]

In giving effect to the above quoted propositions, a necessarily important consideration is the "identity" of *A's* original chattel. If *A's* original chattel is "identified" in the article fashioned by *B* and is the principal tangible component thereof, *B* may lose the profits of his labor and materials or even lose his labor and materials for the benefit of *A*. If *B's* treatment of *A's* chattel has destroyed its identity and created a so-called new species, then *A* may lose his ownership and retain merely a claim for the value of the original chattel.

Justinian purports to consider the question on the basis of "natural reason." But there seems to be some doubt as to whether the alleged application of these doctrines has consistently been either natural or reasonable. Obviously, neither Justinian nor Blackstone provided an adequate or reliable measure, guide, or formula by which to consider and determine whether or not the identity of the original chattel continued or a new species resulted from *B's* action. Does a new species result from merely physical and mechanical changes discernible to the five senses? Must it embrace some change or modification which only a chemist or physicist may ascertain? Is change of species a metaphysical concept?

Application of the test of identity is likely to result in uncertainty, confusion and inconsistency. Apparently, the Romans were in dispute as to whether a new species resulted when grain was threshed. They concluded that a new species resulted from killing a pig and grinding it into sausage, but that the cutting of it into joints did not create a new species. Again, painting on another's canvas did produce a new species, while writing or printing on another's parchment did not.[3] The English common law tenaciously protected *A's* original ownership and ignored *B's* loss so long as *A's* property could be traced and identified in the resulting chattel produced from it by *B*. As one court has stated:

> "It seems to be an established doctrine of the common law, as early as the Year Books, that no change of mere form could divest the right of the owner of the material, as leather made into shoes, cloth into a coat, timber into plank, blocks or shingles; in all of which cases the material is not altered in its qualities or kind, and can be easily identified."[4]

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[2] 2 Blackstone's Commentaries *404; *cf.* 2 Kent's Commentaries *360-*365 (14th ed. Gould).

[3] Lorenzen, *supra* note 1, at 31.

[4] Lampton's Executors v. Preston's Executors, 1 J. J. Marsh. 454, 460 (Ky. 1829); *cf.* Betts v. Lee, 5 Johnson 348, 350 (1810).

A few of the well-known cases from American jurisprudence are sufficient to demonstrate that application of the pronouncements of Justinian and Blackstone can hardly be other than arbitrary and uncertain.

In *Lampton's Executors v. Preston's Executors,*[5] *B* made brick of clay taken from a lot of land belonging to *A*. *B* acted in the honest belief that the lot was his, but upon a determination of boundary lines the lot in question proved to belong to *A*. Some of the brick had been burnt or fired by *B*, but another quantity had not. The Kentucky Court of Appeals first held that both belonged to *A* and that *B* had no right of recovery, because all the brick could be reduced to soil. Upon re-hearing, and after all members of the Court at the time of the initial decision had resigned, the newly constituted Court decided that the unburnt brick belonged to *A* while the burnt brick went to *B*. Although the later decision embraced a little science and some history to justify its conclusion, the opinion began with the following admission of the Court's dilemma:

> "The principle which must decide this case, although extensive in its operation has not been familiar in practice to the courts of this country; nor has it been ascertained with philosophical accuracy, or defined with satisfactory precision, by either the civil or common law. And if it had been so perfectly deduced from the most scientific generalization, its application to this case, depends on analogies so nice, and facts so subtle, as to render the decision of this controversy as perplexing as it is important."

After stating the rule to be that one who comes innocently into possession of another's property may acquire the right to it by effecting a change of species, the Court concedes:

> "It is . . . very difficult to ascertain any principle of uniform and universal application on which the rule itself is founded."

In *Riddle v. Driver,*[6] *B* made charcoal out of wood, apparently owned by *A*. The report of the case affords no clarification as to whether or not *B* had willfully or innocently used *A's* wood to produce the charcoal. In any event, one might have been disposed to conclude that the charcoal was a new species whether determined by the five senses, by science or even by the logical approach of philosophical reasoning. However, the Supreme Court of Alabama upheld *A's* ownership of the charcoal with the brief and categorical statement that:

> "It seems to have been a well settled rule of the ancient common law that the owner of a chattel retained his right of property in it, so long as it was capable of being identified as the same thing although its form might have been entirely changed."

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[5] *Supra* note 4.
[6] 12 Ala. 590 (1847).

Potter v. Mardre[7] raised the problem of identity and change in species for the Supreme Court of North Carolina. There, *B* was in possession of land under his wife's life estate therein. *A* owned the reversion. *B* cut timber off the land and made it into a canoe, although there was no right to make such use of the timber, as against the reversioner. The Court prefaced its disposition of the issue of ownership by declaring the following differentiation between civil law and common law doctrines:

> "In the civil law it is said that the property is changed whenever the species is so far changed that it cannot be reduced to its former rude materials . . . examples of which are when timber is made into a bench, or chest, or ship. The common law differed from this, and it was held that so long as the owner of the original materials could identify them, he could follow them into the manufactured article, as if leather be made into shoes, or cloth into a coat, or a tree be squared into timber."

In reaching the conclusion that *B* owned the boat but owed *A* for the value of the timber at the time it was felled, the Court declared:

> "In our opinion, the equitable rule is that stated from the civil law. The property is changed by a change made in its species or *substantial form,* if made by one who was acting in good faith and under an honest belief that the title was in him."

Burris v. Johnson[8] also dealt with *B's* cutting of *A's* timber and making it into a boat. Apparently, *B* had taken *A's* timber with full knowledge of the latter's ownership and the Kentucky Court of Appeals decided that ownership of the boat was in *A*. But, on the question of transformation or change of identity, the Court made the flat pronouncement:

> ". . . While the original distinctive qualities can be identified, no expenditure of skill, or labor, or money, in the alteration of the form of the timber, by a trespasser, can divest the owner of the trees of his right to the wood, into whatever shape, or for whatever purpose, it may have been changed, without accession of other materials, or of value beyond what accrued in this case."

Eaton v. Langley[9] involved *B's* unintentional conversion of *A's* timber into cross-ties when *B* honestly believed the timber to be his own. The Supreme Court of Arkansas held that no new species resulted from the conversion and that *A* owned the cross-ties. However, the Court conceded that the authorities generally agreed that an original owner lost his property when it was converted into "another form" and increased in value by a person acting in good faith. That Court admitted its predicament on the question of change in species, by adding:

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[7] 74 N.C. 36 (1876).
[8] 1 J. J. Marsh. 196 (Ky. 1829).
[9] 65 Ark. 448, 47 S.W. 123 (1898).

> "But they (*i.e.* the authorities) have not agreed upon any rule by which it can in all cases be ascertained whether this transformation has or has not taken place."

In most instances it is probable that chemical transformation or physical change may be detected by one means or another. But what feasible standard or basis may be utilized to determine whether the transformation or change has or has not been sufficient to produce a new form or species out of *A's* original chattel? As the above-mentioned cases illustrate, the courts have made little progress in defining or specifying the limits within which either of these factors may or may not be applicable. It is apparent that it would be virtually impossible to establish any workable basis by which to determine what kind or degree of such transformation or change does or does not produce a new form or species, except possibly in the extreme cases. In the light of this unsatisfactory state of affairs, the courts have resorted to and utilized another device. That is the theory of relative or comparative value. Relative or comparative value might be explained as applying a comparison of "the value of the original article with the manufactured product to determine whether the thing in its improved condition is or is not physically identical with the article originally taken."[10] Or, it might be stated as involving a consideration of "the proportion in which the materials of one and the labor of another contribute to the value of the resulting product."[11] This last quotation merits some explanation. The question of relative value has sometimes been discussed by the courts in terms of the proportionate contributions of *A's* materials and *B's* labor. But, it appears that the comparison does not rest upon the cost or value of *B's* labor and materials in the market and apart from the conversion involved in the particular case. Rather, the courts take *B's* labor and materials at the amount by which *A's* chattel has been increased in value by virtue of their application to it. In any event, the courts decide that a new form or species is to be recognized because the value of *A's* original chattel is lost when compared with the value after the improvement accomplished by and attributable to *B's* efforts. The uncertainties attendant upon the application of the doctrine of relative value may be readily illustrated.

In *Wetherbee v. Green*,[12] *B* obtained from one he believed to be the owner, a license to cut timber off a parcel of land. Unbeknown to *B*, the licensor had sold his land to *A* before granting the license. Acting in complete good faith, *B* cut timber worth $25, while standing, and made it

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[10]Arnold, *The Law of Accession of Personal Property*, 22 Col. L. Rev. 103 (1922).
[11]Brown, Law of Personal Property 48 (1936).
[12]22 Mich. 311 (1871).

into hoops worth $700 to $800. Upon *A's* action to replevy the hoops, the court held that the ownership of the hoops was in *B*. In disposing of the problem, Cooley, J., said:

> "When the right to the improved article is the point in issue, the question, how much the property or labor of each has contributed to make it what it is, must always be one of first importance. The owner of a beam built into the house of another loses his property in it, because the beam is insignificant in value or importance as compared to that to which it has become attached, and the musical instrument belongs to the maker rather than to the man whose timber was used in making it . . . not because the timber cannot be identified, but because, in bringing it to its present condition the value of the labor has swallowed up and rendered insignificant the value of the original materials. . . .
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> "No test which satisfies the reason of the law can be applied in the adjustment of questions of title to chattels by accession, unless it keeps in view the circumstance of relative values. When we bear in mind the fact that what the law aims at is the accomplishment of substantial equity, we shall readily perceive that the fact of the value of the materials having been increased a hundredfold, is of more importance in the adjustment than any chemical change or mechanical transformation which, how ever radical, neither is expensive to the party making it nor adds materially to the value."

This case did not discard "identity" as the basis for deciding the rights of the parties. The Court did nothing more than to shift the determination of identity from chemical or mechanical considerations to a comparison in value between *A's* original property and the resulting product which *B* made from it. No suggestion was made as to what ratio between the two values should constitute the dividing line between continuance or loss of identity of *A's* chattel. The rights of *A* and *B* turn on whether or not the value of *A's* chattel is "insignificant" in comparison with the value of the product manufactured out of it. But at what point does insignificance come into play?

Six years after *Wetherbee v. Green,* Chief Justice Cooley (as he then was) had another opportunity to clarify the applicability of relative value in *Isle Royale Mining Co. v. Hertin.*[13] By mistake over boundaries and without willful negligence, so far as is indicated in the report, *B* cut *A's* timber into cordwood and piled it on a lake bank. At the lake bank, the cord wood was worth $2.87½ per cord and *B* had expended labor of $1.87½ per cord. In refusing to apply the doctrine of relative value for *B's* benefit, the Chief Justice declared:

> "When the appropriation of the property of another was accidental or through mistake of fact, and labor has in good faith been expended

[13] 37 Mich. 332 (1877).

upon it which destroys its identity or converts it into something substantially different, and the value of the original article is insignificant as compared with the value of the new product, the title of the property in its converted form must be held to pass to the person by whose labor in good faith the change has been wrought, the original owner being permitted, as his remedy to recover the value of the article as it was before the conversion. This is a thoroughly equitable doctrine and its aim is so to adjust the rights of the parties as to save both, if possible, or as nearly as possible, from any loss. But where the identity of the article is susceptible of being traced, *the idea of a change in the property is never admitted, unless the value of that which has been expended upon it is sufficiently great, as compared with the original value, to render the injustice of permitting its appropriation by the original owner so gross and palpable as to be apparent at first blush.*"[14]

In *Eaton v. Langley, supra, B* had a timber contract which he was not allowed to prove at the trial because of a technicality. *A* was the owner of the land, to which the timber contract related, by a deed which was defective in its acknowledgment and could not be recorded as notice to the world. In reliance on the timber contract and with no actual knowledge of *A's* deed, *B* cut timber off *A's* land and made cross-ties, in the honest belief that he had the right to do so. The cross-ties were worth more than six times the value of the standing timber. It was held that the ownership of the cross-ties was in *A*. The Supreme Court of Arkansas approved *Wetherbee v. Green* in principle, but concluded that the value of the original material (*A's* trees) was not so insignificant in relation to the increased value in the form of cross-ties as

"to make the appropriation of the cross-ties by the original owner to his own use, without compensation, appear, under the circumstances, gross injustice at the first blush."

Louis Werner Stave Co. v. Pickering[15] arose out of facts with a familiar ring. Relying upon an erroneous land survey and acting in good faith *B* cut *A's* timber and manufactured it into staves worth about three times the value of the standing timber. Upon *A's* action to repossess the staves, the Texas Court of Civil Appeals held that the ownership of the staves was in *B*. The Court justified the result in the following terms:

"The general rule is that the owner of property has the right to all that becomes united or attached to it by accession; but when such accession is produced by the labor of another, and the identity of the property is thereby changed and its value greatly increased, the right to the property in its changed condition depends upon whether the person converting it acts in good faith believing that the property was his at the time of the conversion. If taken under these circum-

[14]Italics ours.
[15]55 Tex. Civ. App. 632, 119 S.W. 333 (1909).

> stances, the title to the property in its changed condition passes by accession to the person by whose labor its value has been so increased, and the original owner can only recover the value of the property in its condition at the time of the taking."[16]

The above cited cases demonstrate that the utilization of the theory of relative value is as arbitrary and unsatisfactory as is reliance upon the factors of chemical transformation and physical change. Neither a court nor a lawyer has any workable basis from which to ascertain the point at which the value of *A's* chattel becomes insignificant in the course of *B's* application of labor to improve or enhance it. There is no feasible measure by which to determine that a "gross injustice at first blush" may result if *A* appropriates the improved or enhanced article. One has little criticism of the observation that "there is great confusion in the books upon the question what constitutes change of identity."[17]

After deciding the ownership of the improved or enhanced property, there remains the question of the terms upon which settlement between the parties shall be made. When a change of species vests the ownership in *B,* it seems to be generally agreed that *B* is answerable to *A* for the value of the latter's original chattel at the time of taking. But if it is concluded that there is no change of species and that ownership of the improved article remains in *A,* the basis of settlement between the parties may turn upon the fortuitous circumstance that the original owner (*A*) resorts to one remedy or another, as explained in *Dartmouth College v. International Paper Co.*[18]

Suppose *A* elects to recover simply in damages for the chattel taken in good faith. The weight of authority seems to hold that his recovery will be limited to the value of the property at the time of the initial taking, or as sometimes stated, to its present value less the value added by *B's* improvement.[19] Such disposition of *A's* claim for damages is made on the ground that since he has merely sought compensation for what he has lost, and no more, there is no reason or justification for imposing any greater liability upon the wrongdoer.[20] However, it has been held that in an

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[16]Cited with approval in Kirby Lumber Co. v. Temple Lumber Co., 125 Tex. 284, 83 S.W.2d 638 (1935).

[17]Silsbury v. McCoon, 3 N.Y. 379, 386 (1850).

[18]132 Fed. 92 (1904).

[19]Dartmouth College v. International Paper Co., *supra* note 17; Hinman v. Heyderstadt, 32 Minn. 250, 20 N.W. 155 (1884); Milltown Lumber Co. v. Carter, 5 Ga. App. 344, 63 S.E. 270 (1908); Lamoreaux v. Randall, 53 N.D. 697, 208 N.W. 104 (1926); but see Anderson v. Besser, 131 Mich. 481, 91 N.W. 737 (1902).

[20]Weymouth v. Chicago & N.W. Ry., 17 Wis. 550 (1863).

action for the value of the chattel, *A* may recover the full improved value without deduction or allowance for the improvement, particularly when *A's* claim is against an innocent purchaser from *B*.[21]

Let us turn to the situation in which *A* repossesses or seeks to recover possession of the improved property. If a court determines that there has been no change of species and that ownership is still in *A,* the authorities are not in accord as to what, if any, settlement or adjustment must be made for *B*.

Upon *A's* physical recapture of his property in its improved state, the court in *Isle Royale Mining Co. v. Hertin*[22] refused to allow *B* any compensation for the cost or fair value of his labor in effecting the improvement. Under similar circumstances in *Gaskins v. Davis,*[23] the Supreme Court of North Carolina also refused to award anything to *B* for his labor applied to improve the property. In both cases, the courts arrived at such result on the ground that since *A* was entitled to repossess his property, his recaption should not inflict any burden or obligation on him, but the loss must necessarily fall on *B* who made the mistake, though innocently, of enhancing *A's* property. In the latter case, the court suggested that, if *A* had been seeking damages only, the value of *A's* chattel in original form might have been separated from the amount of enhancement by *B's* labor and made the measure of damages.

But, in *Gray v. Robinson,*[24] *B* (a sheriff) seized *A's* grain in the shacks believing it belonged to a debtor. *B* had enhanced its value by having it threshed, sacked, and hauled to storage, paying the expenses of these operations with part of the grain at its market price. Later, *A* sued to recover possession of the grain. He was awarded possession of the grain still in *B's* custody and the remaining grain (*i.e,* the quantity used by *B* to pay his expenses) or the market value thereof; but the court refused to allow *B* anything for his expenses, in mitigation of damages. *Robertson v. Jones*[25] seems to have taken another step by holding that on an action in trespass, *A* could recover in damages for the enhanced value of coal, without deduction of B's expense in enhancing it, since he (*A*) might have obtained the improved coal itself by replevin.

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[21]Schwanz v. Farmers Co-op., 204 Iowa 1273, 214 N.W. 491 (1927); Wing v. Milliken, 91 Me. 387, 40 Atl. 138 (1898); *cf.* Wright v. Skinner, 34 Fla. 458, 16 So. 335 (1894); Birmingham Mineral R.R. v. Tennessee Coal, Iron & R.R., 127 Ala. 137, 28 So. 679 (1900).

[22]*Supra* note 13.

[23]115 N.C. 85, 20 S.E. 188 (1894); see also, Gates v. Rifle Boom Co., 70 Mich. 309, 38 N.W. 245 (1888).

[24]4 Ariz. 24, 33 Pac. 712 (1893); *cf.* Sims v. Mead, 29 Kan. 124 (1883).

[25]71 Ill. 405 (1874); *cf.* Baker v. Wheeler, 8 Wend. 505 (1832).

By the above cited cases on recapture or replevin, *A* wins all when he is given possession or the value of the improved chattel, even though *B* may have expended labor and materials in effecting the improvement or enhancement. Measured by the damage initially sustained by *A*, he may profit materially. The benefit to *A* may well be more in the nature of a penalty to *B* than recompense to *A*. And in the case where both parties have acted bona fide, it is generally admitted that compensation rather than punishment is the end desired. Consequently, there has been some departure from the rule recognized in the cases cited in the two preceding paragraphs.

Eaton v. Langley[26] involved an action in replevin. As to *A's* right in the improved property, the court said:

> "We think it would be lawful and right to allow appellant [*A*] to recover the cross-ties, and to impose upon appellee [*B*] the consequences of his own carelessness."

But in case *A* could not obtain possession, the court ruled that the measure of damages would be the value of the property in its improved state, less the labor and material expended upon it by *B*. The court explained that in such situation, "the law protects the unintentional trespasser . . . by limiting the right of the owner to recover." The dissenting opinion emphasized that the majority had left to *A* the option of recognizing *B's* equities and that by *A's* resort to replevin, "his (*B's*) equities will be ignored."

In *Herdic v. Young*,[27] *B* wrongfully cut *A's* timber, but in good faith. *B* moved the cut timber by water to a point where *A* replevied it. The court explained that *B* could either relinquish the value which his labor added by allowing return of the timber to the owner, or retain the property and give *A* the value of the timber at the place where replevied, "less the cost of cutting, hauling and driving to the boom." The court appeared satisfied that "such a standard of damages, growing out of the nature of the act and of the form of action is reasonable, and does justice to both parties." But, it would seem that in order to protect his outlay, *B* would have to pay *A* for the prospective profits which there might be over and above the initial value of the timber and his outlay. The court clearly indicated that, at least, *B* had the election as to whether he would utilize the opportunity to salvage his outlay upon the basis outlined. Apparently, the Supreme Court of Mississippi has recognized that *B* has a similar election and upon similar terms.[28]

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[26] *Supra* note 9.
[27] 55 Pa. 176 (1867).
[28] Bond v. Griffin, 74 Miss. 599, 22 So. 187 (1896); Accree v. Bufford, 80 Miss. 565, 31 So. 898 (1902).

If the improved article is worth more than the value of *A's* original chattel plus the cost of *B's* labor and materials applied to it, then *A* may anticipate a profit from his action in replevin even though *B* recovers the cost of his labor and materials. The two preceding cases afforded *B* a burdensome opportunity for relief by allowing him to retain or recover the article, provided he first paid to *A* the value of his original chattel plus the prospective profit. The Supreme Court of Wisconsin seemed to think that equity and justice could be accomplished without putting the entire onus on *B*. In *Keystone Lumber Co. v. Kolmon,*[29] *B* cut and manufactured into lumber a quantity of timber which *A* had a license to cut off a third party's land. As to the rights of *A* and *B,* in replevin, the Court declared:

> "The plaintiff [*A*] might adopt and ratify his [*B's*] act and replevy the lumber, by compensating for what he had . . . reasonably expended for the benefit and use of the plaintiff."

While setting forth the state of the authorities on rights in replevin, it seems appropriate to call attention to the Minnesota case of *State v. Shevlin-Carpenter Co.*[30] There the defendant [*B*] cut timber off land of the plaintiff [*A*] and hauled it to Minneapolis, in the honest belief that a certain state official had authority to consummate a sale for it. Plaintiff brought an action to recover the logs. In determining the rights of the parties, the court declared:

> "When the defendant is not a willful trespasser, but takes the property honestly believing, and having good reason for such belief, that he has a legal right to do so, and has increased its value by his labor and money, the injustice of requiring him to pay the owner, in addition to the original value of the property, the value of his labor and expenditures also, is so flagrant that courts have adopted a modified rule in such cases. This modification is based upon the theory that *both parties have an interest in the property* or, in other words, that the defendant has an *equitable interest* in the property to the extent that he has increased its value by his labor bestowed up (*sic*) it in good faith. . . . If he has made an honest mistake, his equitable rights in the property *to the extent to which he has increased its value*, will be recognized, and the plaintiff will not be permitted to appropriate it, under the forms of law, even if the rule is not entirely logical. It is true that in trespass and trover, the owner voluntarily relinquishes the right to the property in species, and in replevin he does not; but in principle the same equitable rule applies to an action of replevin, for a party ought not to be permitted, by a selection of his form of action to defeat the ends of justice, and appropriate the labor of another to which he has no moral or equitable right. . . . *A change in the form of action from trover to replevin cannot change or extinguish the relative rights of the parties in the property.* . . . As a general

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[29]103 Wis. 300; 79 N.W. 224 (1899).
[30]62 Minn. 99, 64 N.W. 81 (1895).

> rule in replevin, where the defendant is a technical trespasser, but his conduct in the premises has been such that the court will recognize his equitable interest in the property, to the extent of its increased value by reason of the labor upon it, its alternative value must be assessed as of the time and place of the taking. . . . If the defendant establishes its good faith in cutting the timber, the alternative value would be the value of the stumpage. . . ."[31]

In consequence of the foregoing presentation in regard to the particular phase of accession here involved, some general observations are submitted.

It is not an uncommon practice for *A* and *B* to agree that *A* will furnish material and *B* will provide labor or labor and additional material for *B* to combine into a product having equal or greater value than the ingredients, and that the ownership of the end product shall be in both parties in proportion to the cost or value of their contributions. On such basis, *B* may grind *A's* grain into flour and bran or may saw and process *B's* timber into finished lumber, or a boat, for their mutual profit. The courts have no difficulty in recognizing and giving effect to a resulting ownership in both parties.

Without such agreement but in all good faith and by honest mistake, *B* applies his labor and material to *A's* chattel in such manner that the end product is not completely the same as *A's* chattel in its initial circumstances and is more valuable than *A's* original chattel, or *B's* labor and materials, or both. It is undeniable that the end product combines something of value from both parties. In this situation the Gordian knot might have been cut very easily by following the analogy of an agreement on combined or common ownership as suggested in the preceding paragraph. It is not an unheard of device in the law to imply or assume an arrangement where none existed, especially when such implication or assumption will afford and facilitate an equitable determination of the rights of the parties.

But those learned in the law have adopted a more complicated approach for the solution of the type of controversy here involved. They declare that ownership of the end product must rest in either *A* or *B*, but not in both.

If the end product is worth less or no more than *A's* original chattel, then no serious problem arises by predicating the rights of the parties upon a determination that ownership is in only one of the parties. But when the end product is worth more than *A's* original chattel, and particularly when it is worth more than *A's* chattel and *B's* labor and material, there is certain to be strenuous effort on the part of each to establish ownership

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[31]Italics ours.

in him alone. For in such a situation, the one who prevails as to ownership stands to profit rather than to be compensated merely for his loss of property or of value. There seems to be little equity and justice in allowing one bona fide party to take all the benefit and profit, simply because he has not inflicted any actual loss upon the other bona fide party. After all one bona fide party's contribution of something valuable which goes into the end product is an essential factor in affording the other party the prospect of benefit and profit.

The cases in which both parties have initially acted in good faith ought to be susceptible of disposition in the light of the facts of life. No reported case is recalled in which it has been suggested that *A* or *B* has sought to establish his ownership of finished lumber, bricks, cross-ties, hoops, boats, charcoal, processed grain and so forth, for the mere purpose of hoarding the same or asserting ownership for its own sake. In most instances of the type here involved the original chattel and the end product are both readily marketable. Actually, the prospect of marketability at a profit is the usual motivating reason for each party's attempt to establish his ownership. Even if common or combined ownership in both parties should be deemed objectionable, the end product might be easily divided between the parties in proportion to their respective contributions which created it. If it should be impractical to divide the thing itself, the available market could be utilized to liquidate its value and the proceeds could be divided on the same basis.

One is hard put to deny, convincingly, the advantages of a basis of solution upon which the equitable interests of both parties might be settled without resort to the esoteric double-talk about change in species, relative value and gross injustice. It is suggested that in these cases of mutual good faith, it would be simple and equitable to recognize and give effect to a common ownership of the end product upon the basis of the ratio of the value of *A's* original chattel to whichever of the following is smaller: *(i)* the value of *B's* labor and material, in the market and independently of the end product; or, (*ii*) the amount by which B's labor and material has made the value of the end product greater than the value of *A's* original chattel.

PRACTICE AND PROCEDURE BEFORE THE MISSISSIPPI WORKMEN'S COMPENSATION COMMISSION

*Frank E. Shanahan, Jr.**

As the Mississippi Workmen's Compensation Act grows older, more and more attorneys discover themselves being confronted by a client who is within its legal coverage. This, in turn, brings both the attorney and his client face to face with questions concerning proper practice and procedure before the Mississippi Workmen's Compensation Commission. While the answer to some of the questions is obvious and simple, the answer to other questions can become elusive and difficult. This article, therefore, is submitted with the thought that the number and difficulty of such questions can be reduced if there is available a general discussion on such practice and procedure. No attempt is made to present the subject in any more detail than is necessary in a general survey. The term "insurance carrier" as used in this article includes not only the conventional insurance companies, but also self-insurers—those employers who have been authorized by the Commission under Section 32 of the Act to provide their own workmen's compensation coverage.

UNCONTESTED CASES

The term "uncontested case" is applied to all cases in which no formal request for a hearing is filed. Although they might have given rise to serious disputes between the parties, if these disputes are adjusted through correspondence, informal conferences, or otherwise short of a formal hearing by the Commission, then the case is still termed "uncontested." At the present time, this classification would apply to about 98% of all cases appearing before the Commission.

In all such cases, the Commission determines administratively whether the adjustment is made in accordance with the requirements of the law. When it is discovered that this has not been done, the insurance carrier is advised to correct the payment of compensation benefits. This determination is made under the Commission's authority to review a compensation case at anytime prior to one year after the date of the last payment of compensation or the rejection of a claim, and to issue such order as is necessary to bring the payment of compensation benefits into line with the facts and the law.[1]

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[1]Miss. Laws 1948, c. 354, § 21; Miss. Code § 6998.27 (1942).

In checking uncontested cases, the Commission relies principally upon the reports of the employer, the doctor, and the insurance carrier. Employers are required to make a report within ten days after the occurrence of an injury or death entitling an employee to compensation benefits.[2] Compensation payments become due on the fourteenth day after the employer has notice of such injury or death,[3] and must be paid within the next fourteen days.[4] To check these payments, within twenty-eight days after receiving notice of an industrial injury or death, all insurance carriers are required to file with the Commission a report showing that payment has commenced. A copy of such report must also be furnished the injured employee so that he can contact the Commission if any part of it is in error. If payment has not been started, a report is required to be filed stating the cause of the delay. As these reports are received, they are checked to determine if the amount of compensation paid is proper. At the time payments are discontinued for any reason, another report is required to be filed indicating the reason for the discontinuance. Within thirty days after the final settlement has been made, a final report showing the nature and total of all benefits paid must be filed with the Commission.[5] In addition to the above reports, in all cases wherein the disability exceeds five days duration or is of a permanent classification, the Commission requires that doctor's reports be filed. Moreover, in unusual situations,

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[2]Miss. Laws 1948, c. 354, § 28 (a), as amended; MISS. CODE § 6998.34 (a) (1942), as amended.

[3]Miss. Laws 1948, c. 354, § 13 (b); MISS. CODE § 6998.19 (b) (1942).

[4]Miss. Laws 1948, c. 354, § 13 (e); MISS. CODE § 6998.19 (e) (1942). In an opinion dated September 27, 1950, the Attorney-General of Mississippi said, in part:

"From a reading of Section 13 of the Act in its entirety, . . . it will be observed that the intent of said section is that action will be taken on a claim for compensation within fourteen days, either by payment or a filing of notice by the employer that he controverts the right to compensation. It will also be observed that sub-section (e) of Section 13 provides that in the event an installment of compensation payable without an award is not paid within fourteen days after it becomes due that a penalty of ten per cent shall be assessed, however, this sub-section specifically authorizes the Commission, upon proper showing, to excuse the payment of the ten per cent penalty. It will also be observed that sub-section (f) of Section 13, which provides for the addition of a twenty per cent penalty upon any installment payable under the terms of an award which is not paid within fourteen days after it becomes due, does not give to the Commission the authority to excuse the penalty as is provided in sub-section (e).

"As I understand the Workmen's Compensation Act, especially its intent and purpose, it is to bring about prompt payment of compensation to an injured employee where such injury arose out of, and in the course of such employee's employment, and to provide a prompt and inexpensive method of determining whether or not such employee is entitled to compensation, and in what amount, in the event such right is controverted. As stated above, every provision of the Mississippi Compensation Act dealing with payment of compensation, requires that action be taken within fourteen days, either by payment of compensation, or by filing notice that the right to compensation is controverted. In this connection, I call your attention to Section 6 of the Act, which provides, 'that in case the injury results in disability of fourteen days or more the compensation shall be allowed from the date of the disability.'" See also *infra* note 44.

[5]Miss. Laws 1948, c. 354, § 13 (g); MISS. CODE § 6998.19 (g) (1942).

special reports are requested from whomsoever needed so that a more complete diagnosis of the claim can be made.[6] These several reports are used as a check against each other, and a follow-up system is employed to be certain that necessary filings are promptly and properly supplied to the Commission.

In addition to this system of reports from the employer, the doctor, and the insurance carrier, the Commission establishes direct contact with the injured employee. As soon as the first report of an industrial injury is received, the Commission sends to both the insurance carrier and the injured employee a short statement summarizing the essential facts of the case and providing each with the claim number which has been assigned the case by the Commission. This notice provides the injured employee with the address of the Commission, and he is requested to get in touch with it if any facts are incorrect or if he is in doubt at any time concerning his rights and duties under the Act. Should he contact the Commission, his particular problem or request is given immediate attention and he is advised of his rights and how to proceed in order to obtain them. An investigation is made of his claim and, when necessary, the proper parties are required to make such adjustment as is needed to bring the handling of the claim into line with the facts and the law.

CONTESTED CASES

The term "contested" or "controverted" is applied to all cases in which a formal request for a hearing is filed with the Commission.

Before discussing the mechanics of contested cases, it might be worthwhile to pause briefly and consider something of the background involved. The purpose of workmen's compensation administration is to settle promptly and inexpensively the claims of injured workers arising out of industrial injuries, and to see that the injured persons or their dependents receive when due the varied benefits to which they are entitled under the law. Emphasis must be placed upon the requirement that all procedural steps involved be simple, informal, inexpensive, and non-technical. Administrative agencies are essentially fact-finding bodies. Therefore, a hearing held by the Commission is primarily a formal inquiry into the facts of a case, not a judicial determination of a controversy between two opposing parties. Before the Commission, injured employees or their dependents are *claimants,* not *litigants.* So it can be seen the Commission sits as a very interested party that is desirous of obtaining all the facts of the case in order to fulfill the purposes of its administration, even if it must obtain

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[6]Miss. Laws 1948, c. 354, § 28 (b); Miss. Code § 6998.34 (b) (1942).

the facts upon its own initiative.[7] If the concept that a hearing before the Commission is a fact-finding process rather than a mode of litigation can be thoroughly digested, then much of the supposed mystery surrounding practice before it or any other administrative agency should disappear. If the ideal of a simple, informal, non-technical, inexpensive inquiry into facts will be remembered, then most of the mechanics of a contested case, in their logical order, will suggest themselves.

Setting the Claim for Hearing

We now come to the matter of what must be done in order to determine any question relating to a claim for compensation benefits.

Jurisdiction

It is provided that the Commission shall have full power and authority to determine all questions relating to the payment of claims for compensation benefits.[8] Such action as is necessary properly to protect the rights of all parties can be taken upon application of any interested party or upon the initiative of the Commission.[9] However, no controversy can be heard by the Commission or an award of compensation made therein while the same matter is pending either before a federal court or any other court in Mississippi.[10] Moreover, should an employer who is required to secure the payment of compensation under the Act fail to do so, the injured employee, or his legal representative in case death results from the injury, may elect to claim compensation before the Commission under the Act, or to maintain an action at law for damages on account of such injury or death. If, under such circumstances, the employee or his legal representative elect to maintain the action at law for damages, the employer cannot plead his common law defenses of assumption of risk, fellow servant rule, or contributory negligence.[11]

Parties

Parties to original proceedings before the Commission are designated claimant, employer, and insurance carrier. The "claimant" is either the injured employee or persons claiming as dependents of a deceased employee. All persons having a claim arising out of a given injury to a given

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[7]Miss. Laws 1948, c. 354. § 18; Miss. Code § 6998.24 (1942).
[8]Miss. Laws 1948, c. 354, § 18; Miss. Code § 6998.24 (1942).
[9]Miss. Laws 1948, c. 354, §§ 13 (h), 18; Miss. Code §§ 6998.19 (h), 6998.24 (1942).
[10]Miss. Laws 1948, c. 354, § 20, as amended; Miss. Code § 6998.26 (1942), as amended.
[11]Miss. Laws 1948, c. 354, § 5; Miss. Code § 6998.05 (1942).

employee are joined as "claimants." The "employer" is the individual or business organization by whom the injured person was employed at the time the injury occurred. The "insurance carrier" is the company that provides workmen's compensation coverage for the "employer." Of course, if the "employer" is a self-insurer, he will also be the "insurance carrier."

Application for Hearing

(1) By the Claimant

Before a claimant requests a hearing, he should first make a demand for compensation benefits upon his employer. Then, should the employer refuse or fail to provide proper compensation benefits within a reasonable time after such demand is made, the claimant can apply for a hearing before the commission for the purpose of having the validity of his claim determined and enforced. The forms necessary to be filed can be obtained from the Commission upon request. The original typewritten copy of each form must be filed with the Commission and a copy of each form should be furnished all other interested parties. Briefly, the forms consist of a claim for compensation, a request for a hearing, and a physician's report. To these should be added copies of any other information or medical reports pertinent to the case.[12]

(2) By the Employer or Insurance Carrier

If either the employer or his insurance carrier should wish to request a formal hearing, somewhat the same procedure is followed, except, of course, no demand for compensation benefits must be made upon anyone. Within fourteen days after knowledge of the alleged injury or death,[13] such employer or his insurance carrier should file with the Commission and each of the other interested parties a report of the alleged injury or death (or

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[12]Miss. Laws 1948, c. 354, § 18; Miss. Code § 6998.24. Procedural Rule 2 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "CONTROVERTED BY EMPLOYEE: Before a claim shall be considered as controverted by the employee, a demand for compensation by registered mail shall have been made on the employer or his carrier. Upon refusal or failure of the employer or carrier to pay compensation within a reasonable time, a motion to controvert, Form-B-11 (Revised), may be filed by the claimant or his attorney, and such motion shall be accompanied by Form-B-5 (Revised), being "Employee's Notice of Injury and Claim for Compensation Benefits," and Form-B-9 (Revised), which is "Physician's Initial Report," and copies of any other information or medical reports pertinent to the case, all of which shall become a part of the Commission's file. Should the employee be without funds with which to obtain a physician's examination, such examination will be ordered by the Commission upon employee's request for same."

[13]Miss. Laws, c. 354, § 13 (d); Miss. Code § 6998.19 (d) (1942).

a denial of its occurrence) and a request for a hearing. To this should be added copies of any other information or medical reports pertinent to the case.[14]

(3) By the Commission

If upon its own initiative the Commission sets a case for hearing,[15] all interested parties are notified of the time, place, date, and subject matter of the hearing and told to be present and prepared to present their evidence.

Setting the Hearing

Regardless of who initiates the proceedings, when the required data is received, it becomes a part of the Commission file and the record of the case. The case is listed by the Commission as "controverted" and put upon the motion docket, at which time it is given a tentative hearing date. All interested parties are notified of the date, time, and place of such tentative setting at least twenty days prior thereto. If any party should not be able to appear for the hearing at such setting, he is requested to notify the Commission immediately. If the case is not continued or reset it is moved from the motion docket to the trial docket at least ten days prior to the date set for hearing. At this time, the setting becomes final and is not subject to being continued except for unusual circumstances beyond the control of the party requesting the continuance. Final notice is sent to all interested parties and each attorney of record, notifying all concerned of the date, time, place, and subject matter of the hearing and informing them to have their witnesses present.[16] Subpoenas are issued only after the case has been moved to the trial docket.

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[14]Miss. Laws, c. 354, § 18; Miss. Code § 6998.24 (1942). Procedural Rule 3 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "CONTROVERTED BY CARRIER OR EMPLOYER: Before a claim can be controverted by the employer or carrier, there shall be a report of the injury filed on Form-B-3 (Revised), the Physician's Initial Report filed on Form-B-9 (Revised), and copies of any other information or medical reports pertinent to the case shall be filed with the Commission; or a denial that any such injury occurred shall be filed. This, together with a request for a hearing filed on Form-B-11 (Revised) will suffice. Failure to pay compensation when due, or failure to file the above-mentioned forms will invoke the penalties prescribed by the Mississippi Workmen's Compensation Act."

[15]Miss. Laws 1948, c. 354, §§ 13 (h), 18; Miss. Code §§ 6998.19 (h), 6998.24 (1942).

[16]Procedural Rule 5 of the Rules and Regulations of the Mississippi Workmen's Comp. Comm. provides: "HEARINGS: All controverted cases shall be placed on the Motion Docket by the Secretary of the Commission. Each such case docketed will be given a number and all parties concerned advised of the date of hearing at least ten days in advance. If no objection is made to the date set, the case will be advanced to the Trial Docket. No case advanced to the Trial Docket shall be postponed except in event of illness of the interested parties or other extreme circumstances, in which instance the Commission may postpone or recess hearings at the instance of either party or on its own motion. On failure of either party to have appeared at a scheduled hearing, the party making an appearance may dismiss by

Continuances

While a controverted case is on the motion docket, it can be continued once for reasonable cause, provided the Commission is notified in sufficient time that a continuance is desired. After the case has been moved to the trial docket, it can be continued only upon a showing of unusual circumstances beyond the control of the person requesting the continuance.[17] Any request for a continuance should be directed to the attention of either the chairman of the Commission or the attorney-referee, giving full grounds concerning why a continuance is desired and suggesting at least three agreeable dates for a resetting of the case. Of course, a copy of the request should also be directed to the attention of all other interested parties.

Subpoena of Witnesses

The Commission and its hearing officers have the power to subpoena witnesses and administer oaths. This power carries with it the authority to issue subpoenas *duces tecum* for the production of books or records. Further, they may examine or cause to be examined any witness or any or all parts of such books or records as may relate to matters in dispute before them.[18] The subpoenas and subpoenas *duces tecum* are usually issued by the secretary of the Commission upon the written request of an interested party or his attorney of record. When issued, the subpoenas or subpoenas *duces tecum* are usually sent in duplicate to the party requesting them, who is responsible for having them properly served. After proper service has been made, the certificate of service on the back of the original of each subpoena must be completed by the individual serving it and the original subpoena then returned to the Commission, where it becomes part of the record of the case. Any cost involved in obtaining service must be borne by the party requesting that the subpoena be issued. All requests for issuance of a subpoena or subpoena *duces tecum* should be filed with the Commission not less than five days prior to the date of

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motion or be awarded compensation upon presentation of proper proof, unless a justifiable excuse for failure to appear is presented within seven days after the date set for hearing, in which event a motion to re-open may be granted in the Commission's discretion. In event neither party appears at the initial hearing, or at the review hearing, the case will be dismissed on motion of the Commission and its order will become final unless proper motion to re-open is filed within seven days as aforesaid."

[17]Procedural Rule 5 of the Rules and Regulations of the Mississippi Workmen's Comp. Comm.

[18]Miss. Laws 1948, c. 354, § 25 (a); Miss. Code § 6998.31 (a) (1942).

hearing.[19] The court of record having jurisdiction in the county where the controverted case is being heard, on application of the Commission, is required to enforce the attendance and testimony of witnesses and production of any books, papers, documents, and other evidence subpoenaed.[20] Provision is made for the same fees and mileage allowances to witnesses as in civil cases in courts of record.[21]

Costs in Proceeding Brought Without Reasonable Ground

If the court having jurisdiction of any proceedings arising out of any compensation claim or compensation order determines that the proceedings in respect to such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings are required to be assessed against the party who has so unreasonably instituted or continued them.[22]

Medical Treatment and Findings

All interested parties to a compensation case are entitled to a full and complete report concerning both medical treatment and medical findings, whether the findings of any medical examination are favorable or unfavorable to any particular party.[23] Medical treatment and medical findings are not privileged in workmen's compensation cases and the Commission insists upon a complete medical record at the hearing. Therefore, much time and effort can be saved by all parties concerned (and perhaps a hearing avoided) if the opposing parties will arrange to exchange their entire medical record prior to the hearing.

The Initial Hearing

Generally

Informal conferences and hearings in controverted cases are conducted by a duly designated representative of the Commission, usually the attorney-referee.[24] Unless otherwise ordered by the Commission, hearings

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[19]Procedural Rule 12 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "SUBPOENAS: Subpoenas will be issued by the Commission in accordance with Section 25 of the Mississippi Workmen's Compensation Act only when it appears that written notice has been filed with the Commission requesting issuance of such subpoenas not less than five days prior to the date of hearing."

[20]Miss. Laws 1948, c. 354, § 25 (a); Miss. Code § 6998.31 (a) (1942).

[21]Miss. Laws 1948, c. 354, § 23; Miss. Code § 6998.29 (1942).

[22]Miss. Laws 1948, c. 354, § 24; Miss. Code § 6998.30 (1942).

[23]Miss. Laws 1948, c. 354, § 7 (f) as amended; Miss. Code § 6998.08 (f) (1942), as amended.

[24]Miss. Laws 1948, c. 354, § 18; Miss. Code § 6694.24 (1942).

are conducted in the county where the injury occurred. All such hearings are open to the public and must be stenographically reported, or recorded and transcribed.[25]

Appearances

The Commission will allow the parties to any compensation proceeding to make their own appearance if they so desire, but it is generally customary to employ attorneys to conduct the proceedings. If a party to a compensation case does not represent himself, he must be represented by a licensed Mississippi attorney in order to make an appearance. An attorney's authority to represent a client is seldom questioned in courts of record, and even less in administrative circles. The Commission has the right and power, however, to require proof of such authority if it deems such proof necessary.[26]

Order of Witnesses

Since the claimant normally has the burden of proof, he presents his witnesses first. They will usually consist of the claimant himself, if he is able to testify, then the lay winesses, medical witnesses, and others whose testimony may be pertinent to the case. Each, of course, is subject to cross-examination by the adverse party. The examination of witnesses is very informal, and, usually, there are few objections to testimony. All witnesses are subject to examination by the Commission's hearing officer. Every case is heard with the rule relaxed, so that witnesses, especially medical witnesses, will not be kept waiting needlessly.

Default Judgment

On failure of either party to appear at a scheduled hearing, the party making an appearance may dismiss by motion or be awarded compensation upon presentation of proper proof. However, if justifiable excuse for failure to appear is presented within seven days after the date set for hear-

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[25]Miss. Laws 1948, c. 354, § 22, as amended; Miss. Code § 6998.28 (1942), as amended.

[26]Miss. Laws 1948, c. 354, § 26, as amended; Miss. Code § 6998.32 (1942), as amended. Procedural Rule 6 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "ATTORNEYS: Upon satisfactory evidence of employment, attorneys shall be entitled to all information available to their respective clients, whether claimants or employers. Either party shall likewise be bound by the acts of his respective counsel until a revocation of employment is filed with the Commission.

"A fee of not more than $25.00, or an aggregate of $25.00 in any one case, shall be considered consultation, and shall not be submitted to the Commission for approval. In all instances where attorneys' fees in any matter exceed $25.00 a fee agreed upon by attorney and claimant shall be submitted to the Commission for approval as provided for in Section 26 of the law, as amended."

ing, a motion to re-open may be granted. In event neither party appears at the initial hearing, or at the review hearing, the case will be dismissed on motion of the Commission and its order will become final unless proper motion to re-open is filed within seven days as aforesaid.[27] When a decision is rendered based upon a non-appearance, at the same time all interested parties are notified of the decision they are also notified that if justifiable excuse for failure to appear at the hearing is presented within seven days thereof, the matter will be re-opened. Moreover, under the authority of Procedural Rule 13 of its Rules and Regulations, the Commission, upon its own initiative, can re-open the case at any time within the limitations set by the Act, if there is a showng that the default judgment would result in great injustice or otherwise materially affect the rights and liabilities of any or all parties concerned.

Scope of Inquiry

As the Commission has the right and power to set a matter for hearing upon its own initiative,[28] its power of inquiry is not restricted to the issues raised by the parties in interest. It can, and it does, go into all questions relating to the payment of claims for compensation. Accordingly, regardless of the stated issue, the hearing will ordinarily explore all issues involved in the claim for compensation and award relief which is complete and finally disposes of the matter. In order to avoid a multiplicity of suits or circuity of action, all persons who are interested in the claim for compensation will be made a party in interest. For example: In a claim for dependency arising from an industrial death, everyone who might possibly have a claim as a dependent of the deceased is made a party in interest, regardless of whether all have individually filed a claim for dependency benefits. Thus, one hearing can usually dispose of the matter.

Matters of Evidence and Proof

(1) General Rules of Evidence Relaxed

In compensation hearings the general rules of evidence are relaxed so as to permit the introduction of all matters relevant to the issue. It is specifically provided that all declarations of a deceased employee concerning the injury in respect to which a hearing is being conducted can be received in evidence. Moreover, if such declarations are corroborated by other evidence, they are sufficient to establish the injury.[29]

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[27]Procedural Rule 5, *supra* note 16.
[28]Miss. Laws 1948, c. 354, § 18; Miss. Code § 6998.24 (1942).
[29]Miss. Laws 1948, c. 354, § 22 (a); Miss. Code § 6998.28 (a) (1942).

(2) Evidence to Which Objection is Made

By motion of either party or by the direction of the hearing officer, there shall be excluded from the record any matters that are libelous or of a personal nature and which matters do not, in the opinion of the hearing officer, have a direct bearing on the case. All other matters sought to be introduced, and which are accepted by the hearing officer over objection of either party will become a part of the record with the objection properly shown.[30]

(3) Proof and Admissibility in General

The claimant in a compensation proceeding must establish every fact necessary to support a legal award. He must show that he received an injury by accident; that at the time of the accident there existed a status of employment; that the accidental injury arose out of his employment; and that the accidental injury occurred in the course of his employment.[31] In addition he must prove the extent of his injury and his average weekly wage. Some claimants may also have to establish the relationship of dependency required for an award of death benefits.[32] If the claimant fails in his proof of any of the essential elements of a compensable cause, he cannot be given an award of compensation.

However, should the employer and his insurance carrier attempt to meet the claimant's case by using any of the special defenses set out in the Act,[33] the burden of proving the existence of such fact is upon them. Moreover, the common-law defenses of negligence, assumption of risk, and the fellow-servant doctrine cannot be successfully pleaded.[34]

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[30]Procedural Rule 6 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "GENERAL RULES OF EVIDENCE RELAXED: In compensation hearings the general rules of evidence shall be relaxed so as to permit the introduction of any testimony pertaining to the issue that will throw light on the matter in controversy. There shall be excluded from the record, however, by motion of either party or by the direction of the hearing officer, any matters that are libelous or of a personal nature which do not in the opinion of the hearing officer have a direct bearing on the case at hand. All other matters sought to be introduced, and which are accepted by the hearing officer over objection of either party, shall become a part of the record with the objection properly shown.

"It shall be the duty of the hearing officer on initial hearings or the Chairman on review to ascertain that any party appearing before the Commission in a legal capacity is a licensed Mississippi attorney. This requirement will not apply to an injured employee handling his own claim, or to an employer who defends his own suit."

[31]Miss. Laws 1948, c. 354, § 4; Miss. Code § 6998.04 (1942).

[32]Miss. Laws 1948, c. 354, § 9, as amended; Miss. Code §§ 6998.13, 6998.14 (1942), as amended.

[33]Miss. Laws 1948, c. 354, § 4; Miss. Code § 6998.04 (1942).

[34]Miss. Laws 1948, c. 354, § 5; Miss. Code § 6998.05 (1942).

Finality of the Initial Hearing Decision

Upon the conclusion of the initial hearing, the hearing officer appointed by the Commission to hear the matter issues his opinion awarding or denying compensation. This opinion is filed in the office of the Commission, and immediately after such filing a copy of it is sent to all interested parties. Then, unless within twenty days immediately following the date of the opinion of the hearing officer a request or petition for review of such opinion by the full Commission is filed by one of the parties in interest, such opinion becomes the final decision of the Commission and entitled to all the benefits of a final award.[35]

As will be noted later,[36] a final award of the Commission can be enforced under Section 19 of the Act by a summary proceeding in the circuit court. The judgment therein rendered is entitled to the same recognition as though rendered in a suit duly heard and determined by the circuit court.

REVIEW OF INITIAL HEARING DECISION BY THE FULL COMMISSION

Generally

As just stated, the initial hearing decision is subject to a review by the full commission if an interested party files with the Commission a request or petition for such review within twenty days immediately following the date of the opinion of the hearing officer. The request or petition must set out the style of the cause, grounds upon which the review is based, certification that copies of the request for review have been filed with all opposing parties, and an affidavit that the review is not taken for purposes of delay. Tuesday of each week is set aside by the Commission as review day. However, unusual circumstances may vary the rules concerning review day in the discretion of the Commission.[37] Such review is appellate

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[35]Miss. Laws 1948, c. 354, § 18; MISS. CODE § 6998.24 (1942).

[36]See discussion under ENFORCEMENT OF AWARDS, *infra*.

[37]Miss. Laws 1948, c. 354. § 18; MISS. CODE § 6998.24 (1942). Procedural Rule 8 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "REVIEW HEARINGS: In all cases where either party desires a review before the full Commission from the decision rendered at the initial hearing, the party desiring the review shall within twenty days of the date of said decision file with the Secretary of the Commission a written request or petition for review before the full Commission. The request or petition shall set out the style of the cause, grounds upon which review is based, certification that copies of the request for review have been filed with the opposing party, and shall contain an affidavit that the review is not taken for the purpose of delay.

"Tuesday of each week will be set aside for review hearings. Unusual circumstances may vary this rule in the discretion of the Commission.

"Within seven days after a case is reviewed by the full Commission, a decision shall be rendered and all parties advised of same, unless the complexity of the matter heard requires further time."

in nature and is had before the three commissioners at the offices of the Commission in Jackson, Mississippi. However, if for just cause one of the commissioners is not able to be present, two commissioners have authority to act for the Commission.[38]

Introduction of Additional Evidence at the Review

All evidence must be presented at the initial hearing of a contested case. Additional evidence will be admitted at the full Commission review only under extraordinary circumstances. The usual procedure when new or additional evidence is desired to be introduced is to file a motion to reopen the case under the authority of Section 21 of the Act. The matter is then referred to the attorney-referee, who passes upon the motion. If it is granted, the case is set for initial hearing again, but restricted to the taking of the new or additional evidence. An amended decision based upon all the evidence of the case is rendered at the conclusion of such additional initial hearing. The parties then can request a review of such amended decision by the full Commission, if they so desire.

However, additional evidence can be admitted at the review before the full Commission in the discretion of the Commission. A motion for the introduction of such additional evidence must be made in writing at least five days prior to the date set for hearing the review by the full Commission. Such motion must show the nature of the evidence desired to be presented, and must present a full explanation as to why the evidence was not presented at the initial hearing. If additional evidence is admitted, it will be stenographically reported and become a part of the record of the case.[39]

Briefs and Argument

While the review before the full commission is upon the record made at the initial hearing, it is expected that briefs will be filed and that all parties

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[38]Miss. Laws 1948, c. 354, § 37 (c), as amended; Miss. Code § 6998.43 (1942), as amended.

[39]Procedural Rule 7 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "INTRODUCTION OF EVIDENCE: All oral testimony or documentary evidence shall be presented to the designated representative of the Commission holding the initial hearing on a controverted case, which testimony or evidence shall be stenographically reported or recorded. Where additional testimony or evidence is offered on the review before the full Commission, it shall be admitted in the discretion of the Commission. A motion for the introduction of additional evidence must be made in writing at least 5 days prior to the date of the hearing of the review by the full Commission. Such motion must show the nature of the evidence desired to be presented and, also, explanation as to why this evidence was not presented on the initial hearing. If additional evidence is admitted it shall be stenographically reported or recorded, and become a part of the record."

will be present to give oral argument. If any or all parties do not intend to file briefs or to be present at the review to give oral argument, the Commission should be so notified prior to the review hearing.

Finality of the Review Decision

Within seven days after a case is reviewed by the full Commission, a decision will be rendered, unless the complexity of the matter heard requires further time.[40] This review decision then becomes final and binding upon all parties to the hearing unless a party to the matter appeals therefrom to the circuit court of the county in which the injury occurred within the time and in the manner required by Section 20 of the Act.

JUDICIAL REVIEW

Generally

Professor Ben F. Small of the Indiana University Law School on page 411 of his book "Workmen's Compensation Law of Indiana," after citing authority, states:

> Strictly speaking there is no such thing as an appeal from an administrative agency, but it is proper to say that the final orders of an administrative body are subject to judicial review. This is a constitutional necessity designed to provide a check by a court of competent jurisdiction that the administrative body has not exceeded its limited function, that there is evidence to support the administrative body's factual conclusions, and that its final determination comports with the law applicable to the facts found.[41]

Our own Supreme Court of Mississippi has taken the same essential position. In *Dixie Greyhound Lines Inc. v. Mississippi Public Service Commission*[42] it said that "a court of competent jurisdiction has power to review any order made by an administrative commission to determine whether it is supported by *substantial evidence,* or is purely arbitrary and capricious, beyond the commission's power, or violates some statutory or constitutional right of an interested party."

Section 20 of the Act provides that the circuit court of the county in which the injury occurred shall review "all questions of law and fact" and

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[40]Procedural Rule 8, *supra* note 37.

[41]For a more detailed general discussion of the subject of judicial review of administrative decisions see the following articles from the Mississippi Law Journal: Todd, *Administration and Law—An Introduction,* 14 Miss. L.J. 287-304 (1942); Barnett, *Administrative Justice and Judicial Self-Restraint,* 14 Miss. L.J. 305-334 (1942); Dodd, *Administration of Workmen's Compensation,* 20 Miss. L.J. 168-172 (1949).

[42]190 Miss. 704, 200 So. 579 (1941), *sugg. of error overruled,* 190 Miss. 704, 1 So.2d 489 (1941). Italics mine.

shall affirm the findings of the Commission "if no prejudicial error be found." This language is capable of being construed as requiring a judicial review of all facts and a finding of prejudical error if all facts are not given consideration or sufficient weight by the Commission. However, a court review based upon a complete and detailed re-examination of the evidence places a heavier burden upon the courts and a lesser degree of responsibility upon the administrative agency. But the terms of the statute are also such that the court can restrict itself to "prejudical error" resulting from findings manifestly against the weight of the evidence, or unsupported by substantial evidence—the principle of substantial evidence being that of section 10(e) of the Administrative Procedure Act enacted by Congress in 1946.[43] The Supreme Court of Mississippi must eventually determine which construction will be followed.

The Circuit Court Review

(1) Taking the Appeal

The statute provides that if an appeal is desired from the decision of the review by the full Commission such appeal must be taken to the circuit court of the county in which the injury occurred within thirty days from the date of such decision. Such appeal is taken by filing notice of appeal with the secretary of the Commission. Such notice must set out the style of the case, the grounds upon which the appeal is taken, certification that copies of the motion of appeal have been filed with the opposing parties, and contain an affidavit that the appeal is not taken for purposes of delay. Within seven days after receipt of such notice of appeal, the Commission under its certificate will transmit to the circuit court the original of all documents and papers on file in the matter, together with a transcript of the evidence, findings, and awards, which constitute the record of the case. A copy of the record of the case is made by the Commission and retained in its files along with any and all briefs filed in the matter while it was before the Commission. The circuit court is always deemed open for the hearing of such appeals and the circuit judge may hear the same in term time or in vacation at any place in his district. Such appeals have precedence over all civil cases, except election contests. However, an

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[43] 5 U.S.C. 1001-1011. (For a discussion of the Federal Administrative Procedure Act of 1946 see Note in 20 Miss. L.J. 62-77.) That the latter interpretation given in the article might be the trend in Mississippi is indicated by Dixie Greyhound Lines v. Mississippi Public Service Commission, *supra* note 42, and California Co. v. State Oil and Gas Board, 200 Miss. 824, 27 So.2d 542 (1946), *sugg. of error overruled,* 200 Miss. 824, 28 So.2d 120 (1946). For a discussion of "substantial evidence" in Mississippi, see Wade, *Recent Mississippi Oil and Gas Cases,* 18 Miss. L.J. 243, 263 (1947).

appeal from the Commission to the circuit court shall not act as a supersedeas unless the court to which such appeal is directed shall so direct; and then only upon such terms as the court shall direct.[44]

(2) Scope of the Appeal

The statute provides further that the appeal shall be considered only upon the record as made before the Commission. The circuit court reviews all questions of law and of fact and if it finds no prejudical error, it is required to affirm the award of the Commission, and remand the case to the Commission for enforcement. However, if it does find prejudical error, the award of the Commission will be reversed and the circuit court will then enter such judgment or award as the Commission should have entered and remand the case to the Commission for enforcement.

The Commission does not take judicial notice of the circuit court's award until it has received notice thereof. Within thirty days following rendition by the circuit court of any order or decree affecting any matter

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[44]Miss. Laws 1948, c. 354, § 20, as amended; MISS. CODE § 6998.26 (1942), as amended. In an opinion dated September 27, 1950 the Attorney-General of Mississippi said, in part: ". . . in view of the intent of the Workmen's Compensation Act to bring about prompt payment of compensation for an injury arising out of, and in the course of employment, and especially the provisions of sub-section (f) of Section 13, which specifically provides that in the event of non-payment of an installment payable under the terms of an award within fourteen days after it becomes due, there shall be added an amount equal to twenty per cent thereof, which shall be paid at the same time as, but in addition to, such compensation, and there being no provision in said section authorizing the Commission to excuse such non-payment, I am of the opinion that the twenty per cent penalty must be assessed upon any employer failing to pay an installment under the terms of an award within fourteen days, irrespective of whether the employer exercises his right of appeal as provided by Section 20 of the Workmen's Compensation Act.

"Section 20 of the Act provides for an appeal by either party within thirty days from the date of the filing in the office of the Commission the final award of the Commission. The provisions of Section 20 take into consideration the fact that subsection (f) of Section 13 will be complied with, that is, compensation awarded will be paid within fourteen days, otherwise there would be no need for that part of Section 20 which provides, 'An appeal from the Commission to the Circuit Court shall not act as a supersedeas unless the court to which such appeal is directed shall so direct, and then upon such terms as such court shall direct.'

"The interpretation herein placed upon Section 13(f) and Section 20 of the Compensation Act does not impose upon the employer an unjust burden. If the employer feels that the final award of the Commission was unjust, and feels that he should not be required to pay compensation thereunder until final determination on appeal, he has only to exercise his right conferred by said Section 20 by requesting the court to which such appeal is taken to grant the appeal with supersedeas. To hold that the employer has thirty days within which to appeal, and fourteen days from and after the expiration of his right to appeal, would be to hold that the employer has forty-four days within which to start payment of compensation under the award, and in my opinion nullify the specific provisions of sub-section (f) of Section 13 of the Act, which require that payment shall be made within fourteen days after the award, and in the event of non-payment within such time that a penalty of twenty per cent shall be paid in addition to the amount due." See also *supra* note 4.

over which the Commission has jurisdiction, the parties to the cause are required to file a copy of such order or decree with the Commission.[45]

Review by the Supreme Court of Mississippi

Appeals can be taken from the circuit court to the Mississippi Supreme Court in the manner now required by law. Recently the Supreme Court in an unreported decision denied a motion to advance a workmen's compensation case still pending before the court at the time of this writing. If such holding is an indication of policy, it would seem that workmen's compensation cases will have no priority on the Supreme Court docket merely because they are workmen's compensation cases. Of course, as in any other type of case, if there are unusual circumstances involved, the case can be advanced on its merits, but not solely because it is a workmen's compensation case.

When such appeal is taken, the Commission should be notified of such fact immediately. Moreover, any award of compensation made by the circuit court and appealed to the Supreme Court will bear the same interest and penalties as does any other judgment awarded in the circuit court. As in the circuit court, within thirty days following rendition by the Supreme Court of any order or decree affecting any matter over which the Commission has jurisdiction, the parties thereto must file a copy of such order or decree with the Commission.[46]

OTHER MATTERS

Enforcement of Awards

It has already been noted[47] that resort to the circuit court can be had to enforce subpoenas of the Commission. Section 19 of the Act provides the

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[45]Miss. Laws 1948, c. 354, § 20; Miss. Code § 6998.26 (1942). Procedural Rule 9 of the Rules and Regulations of the Miss. Workmen's Comp. Comm. provides: "APPEAL FROM COMMISSION AWARD: Should either party desire to appeal from an award of the Commission, the party desiring to appeal shall within thirty days of the date of the award file a notice of appeal with the Secretary of the Commission. The notice shall set out the style of the case, the grounds upon which the appeal is taken, certification that copies of the motion of appeal have been filed with the opposing parties, and contain an affidavit that the appeal is not taken for the purpose of delay.

"When a motion for appeal to the Circuit Court is filed with the Commission the Secretary shall, with a proper letter of transmittal, place all matters possessed by this Commission and pertaining to the appealed case in the hands of the Circuit Court within seven days after such notice for appeal is received by the Commission.

"Following rendition by the Circuit Court or Supreme Court of any order or decree affecting any matter over which this Commission has jurisdiction, the parties to the cause shall file a copy of such decree or order with the Commission within thirty days of the date of rendition. The Commission will not take judicial notice of a higher court's award until the foregoing provision is complied with."

[46]Brown Buick Co. v. Estate of Floyd Smith.

[47]Miss. Laws 1948, c. 354, § 20; Miss. Code § 6998.26 (1942).

machinery for obtaining judicial enforcement of any compensation award of the Commission. Should payment of any compensation due under an award be in default by the employer for a period of thirty days after payment is due and payable, any party in interest can obtain court enforcement by filing with the circuit clerk of the county in which the injury occurred or the county in which the employer has his principle place of business, a certified copy of the compensation award of the Commission. However, if the employer has failed to secure the payment of compensation to his employees as required by the Act (*i.e.,* obtained coverage from an insurance carrier authorized to write workmen's compensation coverage in Mississippi or been approved by the Commission as a self-insurer under the provisions of Section 32 of the Act) resort to the court can be had when the payment has been in default only ten days. With one exception, the award must be a final award; and if an appeal has been taken from the award within the time allowed, it is not such an award as can obtain court enforcement. The one exception is when the award is against an employer who has failed to secure the payment of compensation to his employees as required. Court enforcement of the award in such a situation can be obtained even though he has appealed within the time allowed, unless within ten days after the award would be due and payable said employer deposits with the Commission the amount of the award as security for its payment. After proper filing of the certified copy of the compensation award of the Commission has been made, judgment in conformity therewith must be immediately entered in the circuit court by the clerk of such county. Such judgment is entered in the same manner, has the same effect, and is subject to the same proceedings as though rendered in a suit duly heard and determined by the circuit court, *except that no appeal may be taken from it.* If the payment in default be an installment, in its discretion, the Commission can declare the entire award due and judgment must be entered in accordance therewith. Should any later award of the Commission vacate or modify its original award, the circuit court judgment will be so vacated or modified upon presentation to the circuit court of a certified copy of such later award. Moreover, the award may be so compromised by the Commission as in its discretion may best serve the interest of the persons entitled to receive the compensation or benefits. Neither the Commission nor any party in interest is required to pay any fee to any public officer for filing or recording any paper or instrument or for issuing a transcript of any circuit court judgment so executed.[48]

Lump Sum Settlements

When it is determined to be in the best interest of a person entitled to compensation, the liability of the employer for the weekly compensation

[48]See discussion under SUBPOENA OF WITNESSES, *supra.*

payments, or any part thereof, may be discharged by the payment of a lump sum of money equal to the present value of future compensation payments allowed, computed at 4% true discount compounded annually. The probability of death occurring to the injured employee or any other person entitled to compensation benefits is determined in accordance with the American Experience Table of Mortality. The probability of the surviving wife or any dependent female remarrying is determined in accordance with the remarriage tables of the Dutch Royal Insurance Institute. The probability of the happening of any other contingency affecting the amount or duration of compensation benefits is disregarded. The Commission is the sole judge as to whether a lump sum payment will be to the best interest of the claimant.[49]

The form which must be completed in order to make application for a lump sum settlement can be obtained from the Commission upon request. With one exception, the application can be made only by the person entitled to compensation. The employer, his insurance carrier, or the Commission, cannot make such an application, unless the compensation beneficiary is an alien non-resident (or about to become non-resident) of the United States or Canada.[50] The application should be supported by such evidence as is necessary to show that the person applying for the lump sum settlement is entitled to the amount of compensation requested and that it is in his best interest to have such compensation in a lump sum. Upon receipt of an application, the Commission investigates the matter and then issues an order either granting or denying the request. The entire matter is handled as an ex parte proceeding.

When the Commission approves an attorney fee it can issue an order providing for such fee in a lump sum, regardless of whether an application for lump sum settlement has been made.[51]

When a partial lump sum settlement is allowed, it is usually deducted from future compensation payments last due the claimant, so as not to interrupt the continuity of compensation payments being made at the time of the application.

Compromise Settlements

Generally speaking, there can be no compromise settlement under the Act. One owes or is entitled to all or none of the compensation allowed

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[49]Miss. Laws 1948, c. 354, § 19; Miss. Code § 6998.25 (1942). Italics mine.

[50]Miss. Laws 1948, c. 354, § 13 (j), as amended; Miss. Code § 6998.19 (j) (1942), as amended. The Miss. Workmen's Comp. Comm. has approved tables to be used for making the necessary computations in connection with lump sum settlements and partial lump sum settlements of awards under the Act.

[51]Miss. Laws 1948, c. 354, § 9 (h); Miss. Code § 6998.14 (1942).

for a given factual situation. However, when the prescribed schedules are not applicable and it is not possible to determine the exact extent of disability suffered by a claimant, compromise payments can be made, if approved by the Commission.[52] Each case handled in this manner is dealt with separately and according to its individual merits. However, in all such cases the Commission requires definite evidence that the claim cannot be handled under the prescribed schedules and that there is no reasonable possibility of determining exactly the extent of disability suffered by the claimant.

Third Party Suits

Generally

When the injured employee's accidental injury arises out of and in the course of his employment, but is caused by the fault of some third party, the injured employee or his dependents have both the right to compensation benefits and the right to proceed at law against the third party for damages by reason of the injury or death. Exercising either right will not preclude the compensation beneficiary from later exercising the other. However, the injured employee or his dependents bringing suit against the third party must notify the employer or his insurance carrier within fifteen days of the filing of such suit. If the employer or his insurance carrier join the action, they are entitled to repayment of the amount paid by them as compensation and medical expenses from the net proceeds recovered after deducting the reasonable costs of collection.[53]

Subrogation

An employer or his insurance carrier who has paid compensation to an injured employee or his dependents or to the state treasury under Section 31 of the Act (the second injury fund provisions) has the right to proceed, through subrogation, against the third party at fault. Such action can be brought in the name of the injured employee or his beneficiaries, or in the name of the employer or his insurance carrier, or any or all of them. If reasonable notice and opportunity to be represented in such action by counsel is given the compensation beneficiary, all claims of such compensation beneficiary are determined in such action, as well as the claim of the employer and his insurance carrier. If recovery is obtained against the third party, the compensation beneficiary is entitled to all recovered over and above the amount the employer or his insurance carrier have paid or are liable for in compensation or other benefits, after deducting the reasonable costs of collection.[54]

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[52]Miss. Laws 1948, c. 354, § 26 (c), as amended; Miss. Code § 6998.32 (c) (1942), as amended. Procedural Rule 10, *supra* note 26.
[53]Miss. Laws 1948, c. 354, § 9 (i); Miss. Code § 6998.15 (1942).
[54]Miss. Laws 1948, c. 354, § 30; Miss. Code § 6998.36 (1942).

Settlements

In case of settlement of any action before the trial thereof, such settlement is subject to the approval of the court wherein such action is pending. Any settlement made before an action is brought is subject to the approval of the Commission.[55]

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[55] *Ibid.*

State Bar Section

AN ANNOUNCEMENT BY THE MISSISSIPPI STATE BAR

The officers and commissioners of the Mississippi State Bar are happy to announce that Honorable Cecil Kilpatrick, Chairman of the Committee on Taxation, American Bar Association, will speak at the annual meeting in Biloxi, which is to be held on May 31st, June 1st and 2nd. Mr. Kilpatrick is an interesting speaker and an outstanding tax authority.

Honorable Francis Ireton of Baltimore, Maryland, will talk on the Commercial Code.

We are happy to announce we will have a full program for the ladies who attend the convention. The luncheon will be held at the Gulfport Yacht Club and many other outstanding events will be available to all ladies attending.

The American Bar Association has asked us to call attention to the Southeastern Regional Convention at Atlanta from March 7th-10th. An interesting program has been arranged.

It is urged by the officers and commissioners that you make your reservations early and plan to attend the State Bar Convention at the Buena Vista Hotel, Biloxi, Mississippi, on May 31st, June 1st and 2nd, as every effort is being made to have an outstanding and instructive program, in addition to the usual fun and entertainment.

Sincerely yours,
Gibson Witherspoon, President

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RECENT DECISIONS

Domestic Relations—Right of Unemancipated Minor to Maintain an Action Against His Parent for Personal Tort

Action under the wrongful death statute by administrator of minor plaintiff's estate against administrator of deceased father's estate. The father, in an intoxicated condition, forced his son, under the latter's protestations, to get in the car and refused to let the son drive, and both were killed in a subsequent accident. Held: The unemancipated minor child may maintain an action against his parent for a personal tort, when the parent's tort is wilful or malicious, and when the act is clearly outside the relation of parent and child. *Cowgill v. Boock,* 218 P.2d 445 (Ore. 1950).

There is a division of opinion as to whether at common law a minor child could sue his parent for a personal tort, with perhaps the majority of authorities to the effect that such an action could not be maintained.[1] It is well settled that the child could maintain such an action for damage done to its property.[2] While there seems to be a dearth of evidence concerning the child's personal rights, there is competent authority stating that at the common law such suits were permitted.[3]

The now familiar rule that the minor child may not sue his parent for a personal tort was first laid down in the often quoted case of *Hewlett v. George.*[4] The reasons assigned for denying recovery were chiefly: (1) that sound public policy demands that domestic tranquility be preserved and the supremacy of the parent's control be maintained;[5] (2) that the family funds should not be depleted for the enrichment of one child at the expense of the others;[6] and, (3) that a change in the court's position would encourage fraud and collusive suits between parent and child.[7]

Recently, however, beginning with the vigorous dissenting opinion in *Small v. Morrison*[8] and continuing through the majority opinion of *Dunlap v. Dunlap,*[9] the leading case of this minority view, there has been a trend toward allowing the minor a right of action.

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[1]2 Cooley, Torts § 174 (4th ed. 1932); *See* Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905).

[2]Prosser, Torts § 99 (1941).

[3]*See* Dunlap v. Dunlap, 84 N.H. 352, 150 Atl. 905 (1930); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); See also McCurdy, *Torts between Persons in Domestic Relations,* 43 Harv. L. Rev. 1030 (1930).

[4]68 Miss. 703, 9 So. 885 (1891). *In accord:* Foley v. Foley, 61 Ill. App. 577 (1895); Smith v. Smith, 81 Ind. App. 566, 142 N.E. 128 (1924); Elias v. Collins, 337 Mich. 175, 211 N.W. 88 (1926); Manion v. Manion, N.J. Misc. 68, 129 Atl. 431 (1925); Matarese v. Matarese, 47 R.I. 131, 131 Atl. 198 (1925); McKelvey v. McKelvey, 111 Tenn. 388, 77 S.W. 664 (1903); Roller v. Roller, 37 Wash. 242, 79 Pac. 788 (1905); Wick v. Wick, 192 Wis. 260, 212 N.W. 787 (1927).

[5]Hewlett v. George, *supra* note 4; Wick v. Wick, *supra* note 4, Small v. Morrison, 185 N.C. 577, 118 S.E. 12 (1923); 31 Col. L. Rev. 507 (1921).

[6]Roller v. Roller, *supra* note 1.

[7]McCurdy, *Torts between Persons in Domestic Relations, supra* note 3.

[8]185 N.C. 577, 118 S.E. 12 (1923).

[9]84 N.H. 352, 150 Atl. 905 (1930). *In accord:* Lusk v. Lusk, 113 W. Va. 17, 166 S.E. 538 (1932); Worrell v. Worrell, 174 Va. 11, 4 S.E.2d 343 (1939); *cf.* Wells v. Wells, 48 S.W.2d 109 (Mo., 1932) (recovery allowed in suit by mother against minor child); Ledgerwood v. Ledgerwood, 114 Cal. App. 407, 300 Pac. 144 (1931).

The opinions in these cases deny the validity of the reasons assigned for denying the cause of action. The first reason, that of the maintainance of domestic tranquility, is met by the contention that where the parent is indemnified against loss, the interests of parent and child are not so opposed as to destroy parental discipline and family harmony. In fact, "family harmony is assured instead of disrupted."[10] Again it is argued that where property and contract actions are allowed by the minor against his parent, it is inconsistent to deny the child a personal action.[11]

The second reason, that of the depletion of the family funds, becomes immediately untenable when a third party is involved which will ultimately have to bear the burden. Today when liability insurance is either compulsory by statute or at least virtually essential to the automobile owner it seems anomalous to extend its benefits to strangers and deny them to the family of the insured.[12]

The third consideration, that of the danger of fraud and domestic collusion, seems invalid in view of the fact that insurance companies and the courts are ever on the alert for practices of this type, and it cannot be said that in states where suits between husband and wife are allowed that fraud is being practiced on the courts.[13] It is further argued, as in the instant case, that abandonment of the parental relation may be implied in the case of malicious or wilful injuries and in such a case the parent can not be heard to plead parental immunity.[14]

Even while it may be conceded that the criteria employed to deny the minor a cause of action were sound at the time they were advanced, it is submitted that the complexities of modern life and particularly the advent of liability insurance demand that the position of the courts be modified in accord with the principal case.

Nancy T. Wood.

Insurance—Right to Change Beneficiary—Assignment of Policy

An insurance policy on the life of the insured reserved to the insured "the right to change the beneficiary" upon written notice to the company, and also provided that any assignment by the insured would operate to the extent thereof to assign the interest of any and all beneficiaries. The original beneficiary was the daughter of the insured. The insured assigned the policy to a creditor as collateral security for

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[10]Lusk v. Lusk, *supra* note 9. *In accord:* Dunlap v. Dunlap, *supra* note 3; 9 U. of Pitt. L. Rev. 310 (1947-48).

[11]"It must not be said that the courts are more considerate of the property of the child than of its person." Lusk v. Lusk, *supra* note 9.

[12]Of course in Mississippi the introduction of the fact of the defendant's being insured is grounds for declaring a mistrial. However, it has been suggested that in the jurisdictions where this is true, a distinction should be drawn between the introduction of this fact to prejudice the jury, and the submission of it to the court as a basis for the removal of the disability to sue existing between parent and child. In the latter situation, knowledge of defendant's insurance will not be brought before the jury, but solely before the court, the jury being withdrawn before the introduction of such evidence. 9 U. of Pitt. L. Rev. 311 (1947-48).

[13]32 Marq. L. Rev. 289 (1948-49). See in this connection, Garcia v. Fantauzzi, 20 F.2d 524 (1927), in which the court said: "We are unable to adopt the view . . . that to sustain the right to actions of this kind 'would open the door to the rankest fraud and blackmail of every description, and would be a cause of much injustice and oppression.' The plaintiff cannot be thrown out of court without a trial on the assumption that the allegations of the complaint are false."

[14]Dunlap v. Dunlap, *supra* note 3; Treschman v. Treschman, 28 Ind. App. 296, 61 N.E. 961 (1901).

a loan. Subsequently, the insured changed the beneficiary, substituting his wife for his daughter. HELD: The creditor takes a contingent interest, the wife having a vested interest which could not be defeated without her consent, except by changing the beneficiary in the manner prescribed by the policy. *Phoenix Mut. Life Ins. Co. v. Connelly,* 92 F. Supp. 994 (D. N.J. 1950).

Most of the older life insurance policies did not contain a clause reserving to the insured the power to change the beneficiary. As a result the beneficiary received a vested interest, which the insured could not divest by assignment or change of beneficiary, even with the company's permission, without the beneficiary's consent.[1]

A majority of the courts hold that where the insured has reserved the power to change the beneficiary, without the original beneficiary's consent, the insured may assign the policy, and to the extent thereof, defeat the rights of the beneficiary therein.[2] The *ratio decidendi* of the various cases usually is that the reserved power to change the beneficiary indicates the insured's intention to retain the ownership during his life, thereby giving the beneficiary a mere contingency, which will not vest until the death of the insured, provided the insured dies before the beneficiary, and provided the insured has not changed the beneficiary, or given[3] or assigned[4] or pledged[5] the policy to another. Another popular rationale is to consider the assignment, in substance or effect, a change of beneficiary;[6] still another, is to hold the beneficiary's interest as vested, subject to divestment by the insured,[7] or to hold that the assignment amounts to a new contract between the insurer and the assignee.[8] It is held in many cases that the provision in a policy concerning the manner of effecting a change of beneficiary or an assignment is for the sole benefit of the insurer, and he alone may insist or rely on it.[9]

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[1]Jackson Bank v. Williams, 77 Miss. 398, 26 So. 965 (1899); Johnson v. Bacon, 92 Miss. 156, 45 So. 858 (1908). *Contra:* Boehmer v. Kalk, 155 Wis. 156, 144 N.W. 182 (1913) (Wisconsin is the only jurisdiction in the U.S. holding contra).

[2]Bank of Belzoni v. Hodges, 132 Miss. 238, 96 So. 97 (1923); Lamar Life Insurance Co. v. Moody, 122 Miss. 99, 84 So. 135 (1920); Christian v. Merchants Nat. Bank & Trust Co., 188 Miss. 586, 195 So. 485 (1940); Williams v. Penn. Mut. Life Ins. Co., 160 Miss. 408, 133 So. 649 (1931); Pipper v. Schram, 97 F.2d 507 (6th Cir. 1938); Petty v. Mutual Benefit Life Ins. Co., 235 Ia. 455, 15 N.W.2d 613 (1944); Rawls v. Penn. Mut. Life Ins. Co., 253 Fed. 725 (5th Cir. 1918); Missouri State Life Ins. Co. v. California State Bank, 202 Mo. App. 347, 216 S.W. 785 (1919); Davis v. Modern Industrial Bank, 279 N.Y. 405, 18 N.E.2d 639 (1939); Hawkes v. Mobley, 174 Ga. 481, 163 S.E. 494 (1933); 2 APPLEMAN, INSURANCE LAW AND PRACTICE, 901.

[3]Phillips v. Phillips, 240 Ala. 148, 198 So. 132 (1940); Finger v. Treitler, 52 N.Y.S.2d 841 (1945).

[4]Lamar Life Ins. Co. v. Moody, 122 Miss. 99, 84 So. 135 (1920); Mutual Ben. Life Ins. Co. v. Swett, 222 F. 200 (6th Cir. 1915).

[5]Williams v. Penn. Mut. Life Ins. Co., 160 Miss. 408, 133 So. 649 (1931).

[6]Antley v. New York Life Ins. Co., 139 S.C. 23, 137 S.E. 199 (1927); Merchants' Bank v. Garrard, 158 Ga. 867, 124 S.E. 715 (1924); Battray v. Banks, 31 Ga. App. 589, 121 S.E. 516 (1924); Metropolitan Life Ins. Co. v. Richardson, 27 F. Supp. 791 (W.D. La. 1939). *But cf.* Barner v. Lyter, 31 Pa. Super Ct. 435 (1906).

[7]Merchants' Bank v. Garrard, 158 Ga. 867, 124 S.E. 715 (1924).

[8]Fogg v. Middlesex Mutual Fire Ins. Co., 10 Cush. 337 (Mass. 1852).

[9]Metropolitan Life Ins. Co. v. Richardson, 27 F. Supp. 791 (W.D. La. 1939); Hutsell v. Citizens' Nat. Bank, 166 Tenn. 598, 64 S.W.2d 188 (1933); Missouri State Life Ins. Co. v. Langreder, 87 F.2d 586 (7th Cir. 1937); Fidelity & Deposit Co. of Maryland v. Moore, 177 Va. 341, 14 S.E.2d 307 (1941); Sundstrom v. Sundstrom, 15 Wash. St. 103, 129 Pac.2d 783 (1944); Provident Mut. Life Ins. Co. of Philadelphia v. Bennett, 58 F. Supp. 72 (N.D. Ia. 1946); Oleska v. Kotur, 113 Ind. App. 428, 48 N.E.2d 88 (1943).

A minority of the courts take the view that an assignment and a change of beneficiary are different devices,[10] in that an assignment arises out of an independent contract, and merely transfers the assignor's contingent interest,[11] while a change of beneficiary flows from the existing insurance contract, and being a mere power of appointment, in order to divest the original beneficiary, must be scrupulously exercised in the manner prescribed by the insurance contract.[12]

The minority view is technically correct in its definitions and its inductive reasoning therefrom, but this view does not take into consideration the manifest intent of the insured,[13] or the appropriateness of this view to present day business customs and requirements.[14]

Joe Ivy Gillespie

Municipal Corporations—Liability for Negligence in the Maintenance of Traffic Signals

Defendant city removed one of four traffic lights at a busy intersection but continued to operate the remaining three lights. Plaintiff's husband, relying on a green or "go" signal, drove his automobile into the intersection, resulting in a collision with another automobile entering from the side street where the light had been removed. In an action for damages, the city contended it was not liable for negligence in maintaining traffic signals since this was a governmental function. Held: Once a traffic signal has been installed "the keeping of it in such condition that it would not . . . be hazardous and invite [persons] into danger was a corporate duty, for failure of which liability was incurred." *Johnston v. City of East Moline,* 91 N.E.2d 401 (Ill. 1950).

Generally a city is liable for negligence in the performance of corporate functions and immune from liability in the performance of functions which are governmental. The line of demarcation is frequently indistinct; consequently, conflicting decisions are legion. Although the current tendency is to limit this immunity,[1] the *Johnston* case is the first,[2] without the aid of statute,[3] to squarely hold that maintenance of traffic signals is a corporate function.[4]

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[10]Mutual Benefit Life Ins. Co. v. Swett, 222 F. 200 (6th Cir. 1915); Douglass v. Equitable Life Assur. Soc., 150 La. 519, 90 So. 834 (1922); Anderson v. Broad St. Nat. Bank, 90 N.J. Eq. 78. 105 Atl. 599 (1918); Ehlerman v. Bankers' Life Co., 199 Iowa 417, 200 N.W. 408 (1924).

[11]The interest is contingent because the insured may out-live the beneficiary, thereby revesting the proceeds in the insured or his assigns on the death of the beneficiary.

[12]Douglass v. Equitable Life Assur. Soc., 150 La. 519, 90 So. 834 (1922); Anderson v. Broad St. Nat. Bank, 90 N.J. Eq. 78, 105 Atl. 599 (1918); Schoenholz v. New York Life Ins. Co., 234 N.Y. 24, 136 N.E. 277 (1922); Goldman v. Moses, 287 Mass. 393, 191 N.E. 873 (1934); Sullivan v. Maroney. 76 N.J. Eq. 104, 73 Atl. 842 (1909); Prudential Ins. Co. v. Swanson, 111 N.J. Eq. 477, 162 Atl. 597 (1932); Johnson v. New York Life Ins. Co., 56 Colo. 178, 138 Pac. 414 (1913); Citizens' Bank v. Knight, 15 La. App. 62, 130 So. 270 (1930).

[13]Vance, *The Beneficiary's Interest in a Life Insurance Policy,* 31 Yale L.J. 343, 358 (1922).

[14]Davis v. Modern Industrial Bank, 279 N.Y. 405, 18 N.E.2d 639 (1939).

[1]Prosser, Torts § 108 (1941); Vensel, *Liability of Municipal Corporations in Mississippi,* 3 Miss. L.J. 298, 318 (1930).

[2]*Cf.* Koch v. Chicago, 297 Ill. App. 103, 17 N.E.2d 411 (1938).

[3]Phinney v. Seattle, — Wash. —, 208 P.2d 879 (1949). *Cf.* Mazikowski v. State, 177 Misc. 368, 30 N.Y.S.2d 796 (1940), *aff'd. mem.,* 30 N.Y.S.2d 838 (1941) (where statute imposed duty on state to repair traffic signals).

[4]*Contra:* Cleveland v. Lancaster, 264 N.Y. 568, 191 N.E. 568 (1934); Dorminey v. Montgomery, 232 Ala. 47, 166 So. 689 (1936); Vickers v. Camden, 122 N.J.L. 14,

In restricting the doctrine of municipal immunity in tort, courts have traditionally drawn a distinction between discretionary and ministerial duties, granting immunity for the former and imposing liability for the latter.[5] Thus a city exercises discretion in adopting a plan for sewers and gutters;[6] however, once such improvements have been made, a ministerial duty arises to keep them in repair.[7] Applying this principle, the court in the *Johnston* case found defendant city liable.

It is universally recognized that a city is liable for the negligent failure to repair physical defects in its streets.[8] It would seem, therefore, that a faulty traffic signal might well make the street defective and thereby render the city liable; yet courts have refused to so extend the rule. This refusal has led to a rather anomolous situation. Where injuries are caused by direct impact with the traffic signal, a physical defect exists and liability is incurred;[9] but where the injury is caused indirectly by the failure of the light to function properly the defective signal is held not to be a physical defect but "relates only to the use of the street by the public" for which there can be no liability.[10] By similar reasoning courts have rejected the argument that defective traffic signals come within the purview of the statutes imposing liability upon a city for failure to keep its streets free from nuisances.[11] Rejecting the theory of these decisions, the Appellate Court reasoned that the green light facing the plaintiff was a physical defect and traffic signals "should be on the same basis as the maintenance of any other . . . device affecting the street or its safety."[12] Some courts which deny recovery base their decisions on the ground that a traffic signal is but a substitute for a policeman, and not being liable for the negligence of its police officers, a city is not responsible for the malfunction of a

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3 A.2d 613 (1939); *cf.* Sandmann v. Sheehan, 279 Ky. 614, 131 S.W.2d 484 (1939); Hodges v. Charlotte, 214 N.C. 737, 200 S.E. 889 (1939); Baker v. Waco, 129 S.W.2d 499 (Tex. Civ. 1939); Kirk v. Muskogee, 183 Okla. 536, 83 P.2d 594 (1938). For an indication of the discontent with the majority rule, see the dissenting opinions in Tolliver v. Newark, 145 Ohio St. 517, 62 N.E.2d 357 (1945); Avey v. West Palm Beach, 152 Fla. 717, 12 So.2d 881 (1943).

[5]4 DILLON, MUNICIPAL CORPORATIONS § 1741 (5th ed. 1911); 36 AM. JUR., MUNICIPAL CORPORATIONS § 578. Apparently the court in the *Johnston* case used the words "corporate" and "ministerial" interchangeably. However, the use of the discretionary-ministerial test is but a method employed to impose liability for functions within the governmental field; thus, having determined that the duty is ministerial, the court in the *Johnston* case concluded that the city was liable because exercising a corporate function.

[6]Diklich v. Johnstown, 118 Pa. Super. 283, 180 Atl. 41 (1935); Rogers v. Atlanta, 61 Ga. App. 444, 6 S.E.2d 144 (1939). See PROSSER, TORTS § 108 (1941).

[7]Chicago v. Seben, 165 Ill. 371, 46 N.E. 244 (1897); Vicksburg v. Porterfield, 164 Miss. 581, 145 So. 355 (1933).

[8]Hanrahan v. Chicago, 289 Ill. 400, 124 N.E. 547 (1919); Higginbottom v. Burnville, 113 Miss. 219, 74 So. 133 (1917). See 4 DILLON, MUNICIPAL CORPORATIONS § 1689 (5th ed. 1911).

[9]Mengel v. St. Louis, 341 Mo. 994, 111 S.W.2d 5 (1937); Scarpaci v. Chicago, 329 Ill. App. 434, 69 N.E.2d 100 (1946); *cf.* Harralson v. Vicksburg, 136 Miss. 872, 101 So. 713 (1924).

[10]Auslander v. St. Louis, 332 Mo. 145, 56 S.W.2d 778 (1933); *cf.* Kirk v. Muskogee, *supra* note 4, wherein it was said: "No liability accrues when the sign is removed . . . outside of the liability for injuries caused by it as a defect in the street as distinguished from a traffic regulator."

[11]Martin v. Canton, 41 Ohio App. 420, 180 N.E. 78 (1931); Baker v. Waco, and Tolliver v. New York, *supra* note 4.

[12]338 Ill. App. 220, 87 N.E.2d 20 (1949).

mechanical device designed to take his place.[13] In disproving this argument, the Appellate Court emphasized that these mechanical devices exercise no discretion as do policemen and for this reason the immunity granted cities from liability for the negligence of its police officers should not be extended to traffic lights.[14]

In concluding that maintenance of traffic signals was a corporate function, the court in the *Johnston* case imposed liability in the field of traffic regulation, a field ordinarily considered governmental. It has been said that "torts of public employees are . . . to be regarded . . . as a cost of the administration of government, which should be distributed by taxes to the public."[15] The *Johnston* decision seems to lend support to this commendable position.

John W. Dulaney, Jr.

Torts—Wife Has Action Against Husband's Employer for Loss of Consortium Due to Employer's Negligent Injury of Husband

Plaintiff brought action against defendant company, employer of plaintiff's husband, to recover for loss of consortium resulting from employer's negligent injury to plaintiff's husband. Held: A wife has a cause of action for the loss of consortium due to a negligent injury of her husband by a third party.[1] *Hitaffer v. Argonne Company,* 183 F.2d 811 (D.C. Cir. 1950).

The overwhelming weight of authority is that a wife cannot recover for loss of consortium due to the *negligent* injury of her husband by a third party.[2] This rule was originally predicated on the proposition that a wife cannot sue in cases of negligent invasions because to sustain an action for loss of consortium she must be

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[13]Avey v. West Palm Beach, *supra* note 4. In Martin v. Canton, *supra* note 4, the court expresses this theory as follows: "Had traffic at the intersection . . . been handled by a police officer, who negligently signaled plaintiff to proceed, there could have been no liability . . . for the policeman would be exercising authority in a governmental capacity. *** We see no difference in principle when the city, through its police department, seeks to regulate traffic by a traffic light . . ." *Cf.* Auslander v. St. Louis, *supra* note 10.

[14]See Note 12 *supra.*

[15]Prosser, Torts § 108 (1941). Although most courts agree that the doctrine of governmental immunity in tort should be modified or abolished, they disagree as to whether it should be done legislatively or judicially.

[1]The court further held that the wife's right of recovery was not barred by a clause in the Longshoremen and Harbor Workers' Compensation Act, § 5, as amended, 33 U.S.C.A. § 905, providing for exclusive employer liability.

[2]Tyler v. Brown-Service Funeral Homes, 250 Ala. 295, 34 So.2d 203 (1948); Marri v. Stamford St. Ry., 84 Conn. 9, 78 Atl. 582 (1911); McDade v. West, 80 Ga. App. 481. 56 S.E.2d 299 (1949); Boden v. Del-Mar Garage, 205 Ind. 59. 185 N.E. 860 (1933); Feneff v. New York Central & H. Ry., 203 Mass. 278, 89 N.E. 436 (1909); Bolger v. Boston Elevated Ry., 205 Mass. 420, 91 N.E. 389 (1910); Nash v. Mobile & Ohio Ry., 149 Miss. 823, 116 So. 100 (1928); Harker v. Bushouse, 254 Mich. 187, 236 N.W. 222 (1931); Gambino v. Mfgrs. Coal & Coke Co., 175 Mo. App. 653, 158 S.W. 77 (1913); Stout v. Kas. City Term. Ry., 172 Mo. App. 113, 157 S.W. 1019 (1913); Brown v. Kistleman, 175 Mo. App. 653, 158 S.W. 77 (1912); Helmstetler v. Duke Power Co., 224 N.C. 821, 32 S.E.2d 611 (1945); McDaniel v. Trent Mills, 197 N.C. 342, 148 S.E. 440 (1929); Hinnant v. Tide Water Power Co., 189 N.C. 120. 126 S.E. 307 (1925); Goldman v. Cohen, 30 Misc. 336, 63 N.Y.S. 459 (1900); Howard v. Verdigris Val. Elec. Co-Op., 207 P.2d 784 (Okla. 1940); Smith v. Nicholas Bldg. Co., 93 Ohio St. 101, 112 N.E. 204 (1915); Kosiolek v. Portland Ry., 81 Or. 517, 160 Pac. 132 (1916).

able to show a loss of material services.[3] Thus, it follows that since the wife cannot show such a loss she has no action.[4]

Some courts, however, realizing that the sentimental elements of the consortium, as distinguished from material services, are injured in negligent invasions, have denied the wife recovery on the ground that her injuries were too indirect,[5] remote,[6] and consequential to be capable of measurement.

Exhaustive research reveals that, until the decision in the principal case, only one case had allowed the wife an action for negligent invasion of the consortium,[7] and that case has since been effectively overruled.[8]

The adoption of the Married Women's Acts resulted in the right of the wife to sue almost everywhere for *intentional* interference with the consortium, as by alienation of affection,[9] criminal conversation,[10] and sale of incapacitating drugs.[11] This right to sue for intentional injuries has been justified by the courts on various grounds. Some courts hold that the wife's cause of action actually accrued to her at common law, but that she could not enforce it because of her incapacity to sue.[12] Other courts have extended this cause of action on the ground that a fundamental right of the marriage contract is the right to exclusive marital intercourse which each acquires, and that anyone who interferes with it must pay in damages.[13] In the main, the courts have justified this recovery by the wife for intentional invasions of the consortium and denied it for negligent invasions upon two grounds: first, that the damages caused by loss of consortium are too remote and consequential;[14] second, in the case of alienation of affections and criminal conversation, the husband being a *particeps criminis* can bring no action and the recovery by the wife will not result in double recovery.[15]

While denying the wife recovery in such instances, by the great weight of authority at common law and under statutes, the husband may recover for the loss of his wife's consortium caused by a tort against the wife whether such injury was the

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[3]HARPER, LAW of TORTS 562 (1933); Hall v. Hollander, 4 B.&C. 660, 107 Eng. Rep. 1206 (1825); Dean v. Peel, 5 East. 45 (1804); Marri v. Stamford St. Ry. *supra* note 2; Hinnant v. Tide Water Power Co. *supra* note 2.

[4]Boden v. Del-Mar Garage; Feneff v. New York Central & H. Ry.; Smith v. Nicholas Bldg. Co.; *supra* note 2.

[5]Smith v. Nicholas Bldg. Co.; Brown v. Kistleman; Feneff v. New York Central & H. Ry.; Gambino v. Mfgrs. Coal & Coke Co.; Howard v. Verdigris Val. Elec. Co-Op.; Kosiolek v. Portland Ry.; McDade v. West; *supra* note 2.

[6]Feneff v. New York Central & H. Ry.; Gambino v. Mfgrs. Coal & Coke Co.; Stout v. Kansas City Term. Ry.; Boden v. Del-Mar Garage; Smith v. Nicholas Bldg. Co.; *supra* note 2.

[7]Hipp v. E. I. Dupont de Nemours & Co., 182 N.C. 9, 108 S.E. 318 (1921).

[8]Hinnant v. Tide Water Power Co.; McDaniel v. Trent Mills; Helmstetler v. Duke Power Co.; *supra* note 2.

[9]Hudima v. Hudyma, 131 Conn. 281, 29 A.2d 890 (1944); Deitzman v. Mullin, 108 Ky. 610, 57 S.W. 247 (1900).

[10]Turner v. Heavrin, 182 Ky. 610, 206 S.W. 23 (1918); Woodman v. Goodrich, 234 Wis. 565, 291 N.W. 768 (1940).

[11]Flandermeyer v. Cooper, 85 Ohio 327 (1912).

[12]Bennett v. Bennett, 116 N.Y. 584, 23 N.E. 17 (1889).

[13]Parker v. Newman, 200 Ala. 103, 75 So. 479 (1917); Dodge v. Rush, 28 App. Cas. 149 (D.C. 1906).

[14]Feneff v. New York Central & H. Ry.; Goldman v. Cohen; Kosiolek v. Portland Ry.; *supra* note 2.

[15]Foot v. Card, 58 Conn. 1, 18 Atl. 1027 (1889); Turner v. Heavrin, *supra* note 2.

result of negligence or not.[16] A few courts have decided that the Married Women's Acts bar recovery by the husband for loss of consortium by reason of negligent injury to his wife, but permit him to recover any expenses he may have incurred thereby.[17] These decisions are based on the ground that since the modern statutes give the wife a remedy for such injuries in her own name, the husband's common law remedy has been removed, and the action of the husband has been supplanted by that of the wife.

In spite of almost universal condemnation on the part of legal writers,[18] until the advent of the principal case there was little indication of any change in the rule. According to one eminent authority on the law of torts,[19] the rule can have no other justification than that of history, or the fear of an undue extension of liability of the defendant, or a double recovery by wife and husband for the same damages. There is no valid reason apparent for allowing the wife recovery for a direct interference by alienation of affections, and denying it for more indirect harm through personal injury to the husband, where no such distinction is made in an action by the husband.

The diligent opposition to the rule by the textwriters,[20] combined with the emphatic decision laid down by the principal case tend to emphasize that public opinion as to the equality of the sexes will eventually force recognition of the wife's action for the negligent invasion of her right of consortium.

William F. Dukes

Workmen's Compensation—Exclusiveness of Remedy—Intentional Tort by Employer

Employee brought suit against his employer, a corporation, for injuries received as a result of an intentional assault and battery by an officer and general manager of the corporation. Employer-corporation answered alleging that it carried workmen's compensation insurance covering the injured employee and his remedy was exclusively under that statute. Held: Employee was entitled to elect either to claim compensation under Compensation Act, or to treat wilful assault by an officer of the corporation as a severance of employer-employee relationship and seek full damages in a common law action. *Heskett v. Fisher Laundry & Dry Cleaners Co.*, 230 S.W.2d 28 (Ark. 1950).

Although "injury by accident" has generally been considered from the employee's viewpoint alone,[1] and thus has been held to include intentional injuries in-

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[16]Tomme v. Pullman Co., 207 Ala. 511, 93 So. 462 (1922); Brahan v. Meridian Light & Ry., 121 Miss. 269, 83 So. 467 (1919); Guevin v. Manchester St. Ry., 78 N.H. 289, 99 Atl. 298 (1916); Baltimore & Ohio Ry. v. Glenn, 66 Ohio St. 396, 64 N.E. 438 (1902); Selleck v. City of Janesville, 154 Wis. 570, 80 N.W. 944 (1899).

[17]Marri v. Stamford St. Ry.; Bolger v. Boston Elevated Ry.; Harker v. Bushouse; Helmstetler v. Duke Power Co.; *supra* note 2.

[18]Lippman, *The Breakdown of Consortium*, 30 Col. L. Rev. 651 (1930); Holbrook, *The Change in the Meaning of Consortium*, 22 Mich. L. Rev. 1, 8 (1923); Kinnaird, *Loss of Consortium*, 35 Ky. L. Rev. 220, 223 (1947); Notes, 29 Mich. L. Rev. 820, 822 (1940-41), 9 Ind. L. Rev. 182, 185 (1933-34), 5 Cornell L.Q. 171, 173 (1919-1920); Prosser, Torts 948 (1941); Harper, Law of Torts 562 (1933).

[19]Prosser, *supra* note 18.

[20]See note 18 *supra*.

[1]Bohlen, *A Problem in the Drafting of Workmen's Compensation Acts*, 25 Harv. L. Rev. 328, 340 (1912).

flicted by both fellow employees,[2] and third parties,[3] an exception has been made where the employer himself injures the employee. Here some courts allow, as in the principal case, a common law action,[4] while in others the legislatures achieve a similar effect by special provisions in their acts.[5]

It would seem clear that where the statutes contemplate assault by the employer, the remedy under the act is exclusive in view of the universal adoption of the section providing that remedies under the act are exclusive of all other rights and remedies.[6] But the Mississippi Workmen's Compensation Act[7] falls within that group which make no mention of an intentional and wilful assault by the employer. Thus a dual problem arises: (1) is an intentional and wilful assault by the employer compensable under the act, and (2) is such remedy exclusive.

Where the question has arisen in other jurisdictions the courts have adopted one of three views. The first is that the employee has an election of remedies; that is, he may consider the employment relationship ended by the assault and sue at common law or he may treat the relationship as continuing and seek redress under the compensation act.[8] The second view is that there can be no recovery under the act and that the only remedy is by a common law action.[9] The third position taken is that the remedy is exclusively under the act.[10]

Since the compensation acts are in derogation of the common law, it is from their language that one must determine the extent to which both employees and employers are deprived of their common law rights and defenses.[11] An existing common law remedy is not to be taken away by a statute unless by direct enactment or necessary implication.[12] Following this line of reasoning, it would seem that the true test of exclusiveness under the compensation acts is whether or not the particular act involving injury was reasonably contemplated by the statute. Since the Mississippi act makes no mention of intentional and wilful assaults by the employer, it is sub-

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[2]Earley Stratton Co. v. Rollison, 156 Tenn. 256, 300 S.W. 569 (1927); Inland Steel Co. v. Flannery, 88 Ind. App. 347, 163 N.E. 841 (1928).

[3]Campbell v. Borough of Oakmont, 157 Pa. Super. 283, 43 A.2d 237 (1945); Byas v. Hotel Bentley, 157 La. 1030, 103 So. 303 (1924).

[4]Boek v. Wong Hing, 180 Minn. 470, 231 N.W. 233 (1930); Rumbolo v. Erb, 19 N.J. Misc. 311, 20 A.2d 54 (1941); Le Pochat v. Pendleton, 187 Misc. 296, 63 N.Y.2d 313 (1946).

[5]California and Massachusetts provide for an increase in compensation where the injury is the result of the wilful act of the employer. CALIF. LABOR CODE § 4553 (Deering, 1943); 4 MASS. ANN. LAWS, c. 152, § 128 (1942). Oregon, Washington and West Virginia expressly provide for a common law recovery over and above the recovery under the act. OREGON CODE ANN. § 1828 (1930); WASH. REV. STAT. tit. 50, § 7680 (Remington, 1932); W. VA. CODE ANN. § 2527 (Michie. 1943). Texas awards exemplary damages. TEX. REV. CIV. STAT., tit. 130, art. 8306, § 5 (Vernon, 1925).

[6]1 Schneider, Workmen's Compensation § 90 (per. ed. 1941); MISS. CODE § 6998-05 (1942).

[7]MISS. CODE §§ 6998-01 to 6998-59 (1942).

[8]Boek v. Wong Hing, *supra* note 4.

[9]Rumbolo v. Erb, *supra* note 4.

[10]McLaughlin v. Thompson, Boland & Lee, 72 Ga. App. 531, 34 S.E.2d 563 (1945). In this case, it will be noted that the assault was by a corporate general manager as in the principal case, yet the court speaks in terms of "fellow-worker" and "superior fellow-worker." As to the court regarding a general manager as the *alter ego* of the corporation, see Stewart v. McClellan's Stores Co., 194 S.C. 50, 9 S.E.2d 35 (1940).

[11]1 SCHNEIDER, WORKMEN'S COMPENSATION § 89 (per. ed. 1941).

[12]King v. Viscaloid Co., 219 Mass. 420, 106 N.E. 988 (1914).

mitted that the better rule is that announced in the principal case—that the employee may view the assault as compensable and seek recovery under the act or waive the statutory compensation and seek redress in a common law action.[13]

W. F. Selph, Jr.

Workmen's Compensation—Humane Acts in Emergencies

Deceased was drowned while attempting to swim through forbidden, lethal currents to rescue an unknown person from a reef a half-mile off shore from his employer's recreation center. Held: Workmen's compensation benefits denied on the ground that this was not "recreation in the course of his employment." *Brown Pacific Maxon, Inc. v. O'Leary,* 182 F.2d 772 (9th Cir. 1950).[1]

While compensation is ordinarily not recoverable unless the injury arises out of and in the course of employment,[2] the general rule is that the employee does not step beyond his employment when, confronted with a sudden emergency, he goes beyond his regularly designated duties in an attempt to save his employer[3] or a fellow employee.[4] It has been held that the same rule applies in case of injury arising from an attempt in emergency to rescue a fellow employee who technically was working for some other employer.[5] However, where the humane act is directed towards third parties, many recalcitrant courts have denied recovery.[6]

In order to recover under the compensation acts there must be some relationship—"causal connection"—between the employment and the injury.[7] Where the courts have allowed employees to recover compensation for injuries substained while going

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[13]"It would be against sound reason to allow the employer deliberately to batter his helper, and then compel the worker to accept the usual moderate or small weekly workmen's compensation benefits . . . The weight of authority gives the employee the choice of proceeding against the employer at common law or accepting workmen's compensation benefits." Horovitz, *Assaults and Horseplay,* 41 Ill. L. Rev. 342 (1946).

[1]Although the deceased in the instant case was engaged in the enjoyment of recreational facilities furnished by the employer when the "emergency" arose, this court had previously held that the use of the employer's recreational facilities by the employee is "an incident of the employment." Liberty Mutual Ins. Co. v. Gray, 137 F.2d 926 (9th Cir. 1943). Furthermore, it is generally held that where recreation is furnished and controlled by the employer for the purpose of developing better service and greater efficiency among his employees, such recreation is "an incident of their employment." Piusinski v. Transit Valley Country Club, 259 App. Div. 765, 18 N.Y.S.2d 316 (1940), *aff'd.,* 283 N.Y. 674. 28 N.E.2d 401 (1940); *Schneider,* Workmen's Compensation Text §§ 594, 595 (3d ed. 1950).

[2]Miss. Code § 6998-04 (1942); Wilson v. Town of Mooresville, 222 N.C. 283, 22 S.E.2d 907 (1942); Garbison-Walker Refractories Co. v. Brown, 296 Ky. 629, 178 S.W.2d 39 (1944).

[3]Baum v. Industrial Commission, 288 Ill. 516, 123 N.E. 625 (1919).

[4]Dragauich v. Iroquois Iron Co., 269 Ill. 478, 109 N.E. 999 (1915).

[5]Waters v. William J. Taylor Co., 218 N.Y. 248, 112 N.E. 727 (1916).

[6]Sichterman v. Kent Storage Co., 217 Mich. 364, 186 N.W. 498 (1922); Priglis v. Fonda J. & G. Co., 129 App. Div. 776, 183 N.Y.S. 414 (1920).

[7]Croom v. Cardillio, 119 F.2d 697 (D. C. Cir. 1941); Associated Indemnity Corp. v. Industrial Accident Commission of California, 18 Cal.2d 40, 112 P.2d 615 (1941).

to the aid of third parties in emergencies,[8] they have usually found this "causal connection" by indulging in legal fictions such as that "the employer might have been liable if the third party had been injured"[9] or that "the employee had to clear the road before he could proceed with his employment."[10]

Workmen's Compensation Acts are not health[11] or life[12] insurance acts, but they have humanitarian purposes.[13] Furthermore they are to be construed liberally in favor of the employees.[14] Therefore it seems that where because of the exigency of the situation an employee steps beyond the scope of his employment to do a humane act, the court should not look for a "causal connection," but should base its holding upon this act alone. This principle was not unknown at common law;[15] and Justice Cardozo said in *Wanger v. International Ry.*:[16] "Danger invites rescue. The cry of distress is the summons to relief. The law does not ignore the reactions of the mind in tracing conduct to its consequences."

Although no court has in fact based its opinion upon this ground alone without looking for a "causal connection," many courts have rationlized along this line.[17] Pursuing this trend to its logical and just conclusion, it is submitted that a court should not refuse relief to an employee who, when confronted by a sudden emergency, does the humane thing.[18]

K. Hayes Callicutt

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[8]Glens Falls Indemnity Co. v. Stockwell, 58 Ga. A. 111, 197 S. E. 647 (1938); Ocean Accident & Guaranty Corp., v. Industrial Accident Commission, 180 Cal. 389, 182 Pac. 35 (1919).

[9]Short v. Kerr, 104 Ind.A. 118, 9 N.E.2d 114 (1937); Ocean Accident & Guaranty Corp. v. Industrial Commission, *supra* note 8.

[10]Herman v. Follmer Trucking Co., 129 Pa. 447, 195 Atl. 632 (1937).

[11]Lux v. Western Gas Co., 107 F.2d 1002 (5th Cir. 1940); General Properties Co. v. Greening, 154 Fla. 814, 18 So.2d 908 (1944).

[12]Parks v. Miller Printing Mach. Co., 336 Pa. 455, 9 A.2d 747 (1940); Rector v. Ragnar-Benson, Inc., 313 Mich. 227, 21 N.W.2d 129 (1946).

[13]Horovitz, Injury and Death Under Workmen's Compensation Laws 7, 8 (1948).

[14]Glens Falls Indemnity Co. v. Schwell, *supra* note 8; Mack Coal Co. v. Hill, 204 Ark. 407, 162 S.W.2d 306 (1942).

[15]Eckert v. The Long Island Railroad Co.. 43 N.Y. 502, 3 Am. Rep. 721 (1871).

[16]232 N.Y.S. 176, 133 N.E. 437 (1921).

[17]Short v. Kerr, *supra* note 9; Ocean Accident & Guaranty Corp., *supra* note 9; Pullkammer v. Industrial Commission, 371 Ill. 497, 21 N.E.2d 575 (1939).

[18]It may be argued that to extend liability to include such acts would place an unfair burden on the employer in the form of higher insurance rates. But that argument proceeds upon the assumption that such acts occur with a frequency against which the carrier must guard himself. It should be a matter for "judicial knowledge" that these acts of individual heroism, so highly valued in our society, occur so infrequently that the deleterious effect of liability upon the employer, if any at all, would be negligible.

BOOK REVIEWS

SELF-INCRIMINATION. By Fred E. Inbau. Springfield, Illinois, Charles C. Thomas, Publisher, 1950, pp. 87. $2.50.

Mr. Inbau[1] in his treatment of the self-incrimination privilege has not attempted to cover the entire field of the application of the privilege, but has largely limited his discussion to the question of what an accused person can be compelled to do, and to what tests by investigating officers he can be required to submit. The book is thus primarily concerned with the privilege as a protection against extra judicial compulsion as distinguished from judicial compulsion. Although the reader may not agree with the author's viewpoint that the privilege is properly applicable to extra judicial compulsion, still the need for a treatise on the privilege as applied to extra judicial compulsion is readily apparent. This is particularly true in view of the numerous decisions on this point. The courts, in discussing the admissibility of evidence obtained by investigating officers who in obtaining the evidence required the accused to submit to some test or to perform some act have been forced to determine whether or not the evidence was obtained in violation of the accused's privilege to refrain from self-incrimination.

Among the acts or test used by investigating officers to obtain evidence from the accused which are considered by the author are whether the accused can be compelled to submit to the examination of his body for identifying scars, marks and wounds; to write a specimen of his handwriting; to submit to a chemical test for intoxication; to submit to a lie detector test or a truth serum; to give a specimen of his blood; to remove disguising effects or put on clothing for identification purposes, or to undergo a mental examination. Although none of these subjects are discussed at great length each is thoroughly considered and authorities are cited both in support of the author's conclusions and contrary thereto.

The book would be of value to every attorney engaging in a criminal practice but of particular value to a prosecuting attorney or an investigating officer. For the investigating officer it would serve as a concise and understandable summary of what he could and could not require an accused to do in the course of a criminal investigation. For the prosecuting attorney it would serve as a pocket-sized brief to which he could readily refer in the course of a trial and in a matter of seconds present a logical and authoritative answer to any objections made by defense counsel to the admissibility of evidence obtained from the accused by acts or tests to which the accused was compelled to submit by investigation officers upon the grounds that the accused's right to refrain from self-incrimination had been violated.

*Milton H. Mitchell**

LIFE INSURANCE AND ESTATE TAX PLANNING. By William J. Bowe. Nashville, Vanderbilt University Press, 1950, pp. 86. $2.00.

This book gives an understandable, short-enough-to-read discussion and treatment of the title as indicated. Professor Bowe[1] has interpreted the sections of the International Revenue Code applicable to the title subject in terminology which is understandable to layman and lawyer alike.

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[1]Professor of Law, Northwestern University.

[1]Professor of Law, Vanderbilt University. Author of Tax Planning for Estates.

The pertinent law, rules and regulations with respect to life insurance in connection with estate planning and the impact of federal estate and income tax with respect thereto is almost a specialty within a specialty. The author makes it clear that the generally accepted procedure with respect to the disposition of property in connection with estate tax planning is different from the procedure wherein life insurance is concerned. In addition, he makes it clear that the death of the wife is a significant event which probably should be covered by life insurance, for there is the contingency that she may predecease her husband, in which event there would result a loss of substantial savings afforded by the 1948 statute permitting marital deductions if she were not so covered. The reverse would, of course, be true if the wife's estate is more in need of proetction.

A distinction is made by the author, based on the law and regulations as written, between insurance "taken out" on the life of decedent, and insurance "taken out" by the decedent on the life of the spouse. Transfers to insurance trusts, for the benefit of children or grandchildren, etc., in the latter case, are definitely indicated and recommended to avoid inclusion in the estate of the beneficiary. Many pit falls are pointed out.

In concluding, it may be said the book is definitely worthwhile to the trust officer, the underwriter and the layman, as well as to the practitioner. It is refreshing to see a highly complicated matter simplified as Professor Bowe has done in this case.

*G. B. Herring**

LAWYERS TAX MANUAL. By Alfred S. Pellard. Clark Boardman Company, Ltd., 11 Park Place, New York 7, New York, 1949, pp. 582. $12.

SUCCESSFUL TAX PRACTICE. By Hugh B. Bickford. Prentice-Hall, Inc., 70 Fifth Avenue, New York 11, New York. 1950, pp. 428.

It is well recognized by most lawyers today that the number of times that a lawyer in general practice must contend with the tax problems of his client are ever increasing. It is equally well recognized that more and more lawyers are entering the field of taxation as specialists. The tax problems of the general practitioner are not the same as those of the tax specialist. The two books under review are answers to these different problems. Each succeeds remarkably well in what it purports to accomplish.

The *Lawyers Tax Manual* discusses the problems with which the general practitioner is faced as they are affected by the federal income, estate, and gift taxes. After first outlining the procedure in tax cases generally, Mr. Pellard proceeds to discuss the federal taxes as they affect the drafting of wills, the drafting of inter vivos trusts, life insurance, the operation of a small business, the sale of a business, divorce and separate maintenance, etc. At the end of each chapter Mr. Pellard has inserted some typical tax forms (e.g. a form illustrating the use of the power to appoint and the marital deduction in a will) which can be used by the general practitioner for tax-saving purposes.

Unlike Mr. Pellard, Mr. Bickford is concerned with the problems with which the *tax* practitioner in faced, in the presentation of tax cases before various governmental agencies. The first part of *Successful Tax Practice* is devoted to a discussion of the

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*Attorney at Law, First National Bank, Jackson, Mississippi.

preparation of the *facts* of a tax case (e.g. the proving of depreciation, obsolescence, fair market value, value as proved by comparative sales, cost of production, or capitalization, etc.). In subsequent chapters, there follows an excellent discussion of procedure before the various governmental agencies which handle tax cases (i.e. the Collector of Internal Revenue, the Technical Staff, the Tax Court, the Federal District Courts, and the Court of Claims). This discussion is much better than that given in the first three chapters of the *Lawyers' Tax Manual.* These chapters are interspersed with forms, both official and unofficial, which are used in appearing before the various courts and agencies.

Mr. Bickford has spent more than a quarter of a century practicing taxation, both in the Bureau of Internal Revenue and outside. As a result, he is well qualified to discuss the four general phases of tax practice: (1) minimizing the tax burden; (2) preparing the return; (3) practice before the Bureau; and (4) practice before the Courts. He has described these four phases very lucidly, using actual cases from his experience.

While *Successful Tax Practice* is a very well written book, the general practitioner would find the *Lawyers' Tax Manual* more useful. This is largely due to the large number of forms which Mr. Pellard has included in the latter book. In connection with alimony and separate maintenance payments, for example, Mr. Pellard has included forms for regular alimony payments and child's support, for separating regular alimony payments from child's support, for installment payments of alimony, for a lump sum alimony settlement, and for the payment of alimony payments out of a trust fund. Since such forms would be utterly worthless unless the lawyer knew the tax consequences of choosing one particular clause rather than another, Mr. Pellard has very carefully explained the tax effects of their use.

It is not possible, of course, to choose between these two books, should one decide to purchase one or the other for his library. While the general practitioner might prefer a more practical book such as Mr. Pellard's, he would also find the discussions of procedure and the presentation of tax cases in Mr. Bickford's very illuminating. On the other hand, the tax practitioner would certainly find many helpful hints in the Lawyers' Tax Manual. Perhaps the only solution would be to try to obtain both.

*Harold G. Wren**

*Acting Associate Professor of Law; University, Mississippi.

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